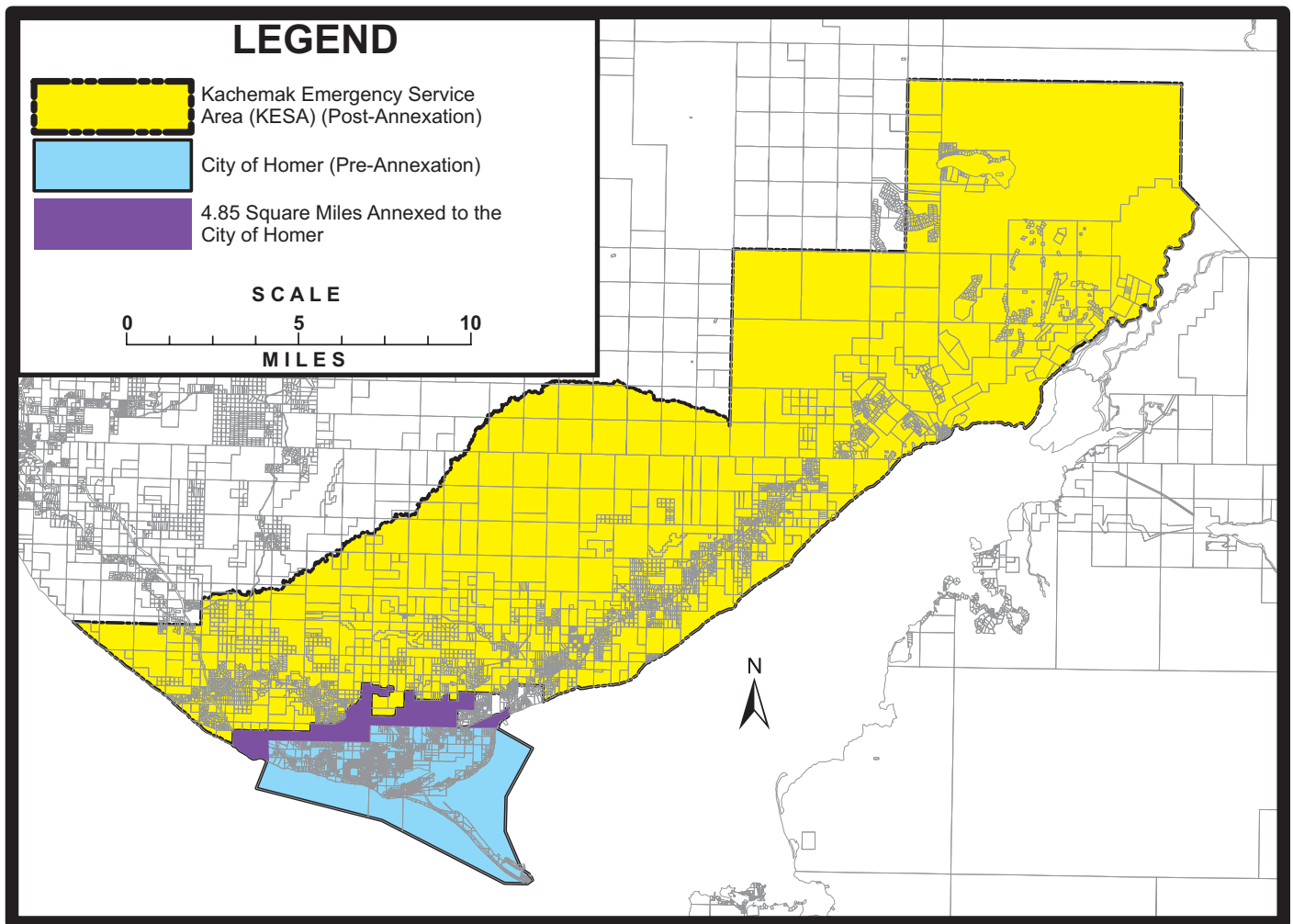


# Preliminary Report on Remand Regarding the Impact of the 2002 City of Homer Annexation on the Kachemak Emergency Service Area



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## **Acknowledgements**

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[http://www.commerce.state.ak.us/dca/lbc/homer\\_annex\\_remand.htm](http://www.commerce.state.ak.us/dca/lbc/homer_annex_remand.htm)

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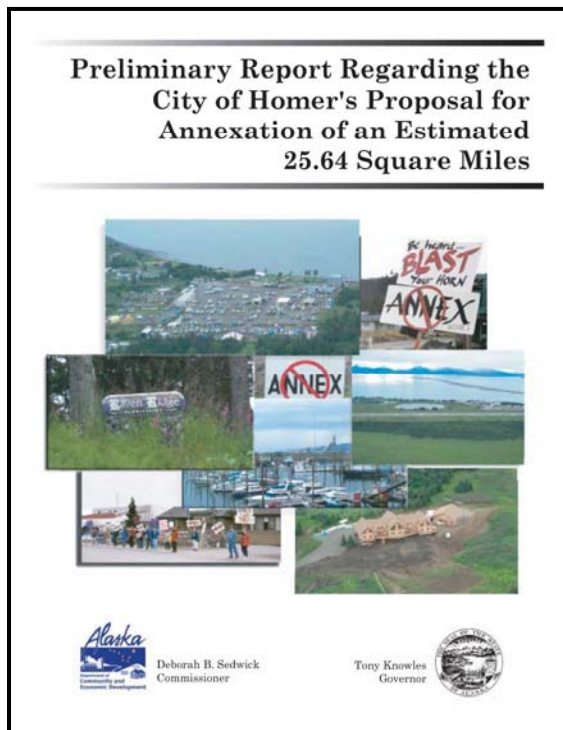
## OVERVIEW

In March 2000, the City of Homer ("City") petitioned the Alaska Local Boundary Commission ("LBC" or "Commission") to expand the City's jurisdictional territory by 25.64 square miles. Over the following twenty-one months, the proposal was addressed at great length.

The level of written responsive comment on the proposal was unparalleled for any city annexation proceeding in Alaska.<sup>1</sup> The City responded to those comments in a formal reply brief. The Alaska Department of Community and Economic Development ("DCED" or "Department"), as staff to the Commission, then reviewed the entire written record (City's Petition, responsive briefs, public comments, and the City's Reply Brief) and conducted its own research and analysis. Following such review, research, and analysis, LBC Staff published a 412-page Preliminary Report with recommendations to the LBC regarding the matter

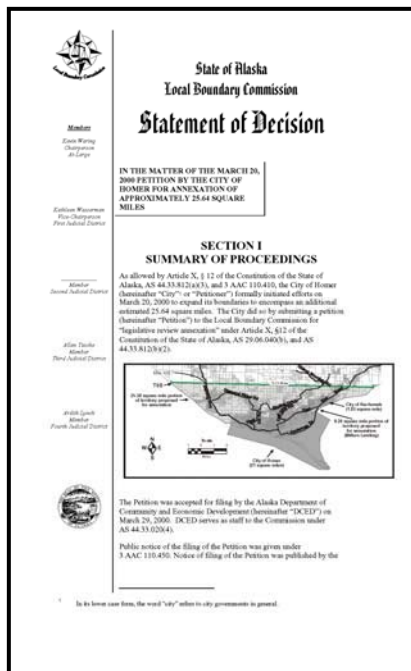
(*Preliminary Report Regarding the City of Homer's Proposal for Annexation of an Estimated 25.64 Square Miles* ("Annexation Preliminary Report" as distinguished from this "Remand Preliminary Report"). The Annexation Preliminary Report was widely circulated for public review and comment. Thirty-two sets of comments on the Annexation Preliminary Report were submitted. After considering those comments, LBC Staff published its Final Report on the matter.

In December 2001, the LBC traveled to Homer. Touring by helicopter and automobile, the Commission spent several hours inspecting the territory proposed for annexation. After the inspection, the LBC held a two-day public hearing in Homer. Over the course of the hearing, 91 summaries, opening statements, testimonies, comments, and



<sup>1</sup>During the initial opportunity for written comment on the matter, 14 responsive briefs comprising 751 pages (including exhibits) were filed with the LBC. Additionally, 168 responsive letters were submitted.

closing statements were presented to the Commission. Following the conclusion of the hearing, the LBC deliberated in open session for approximately two hours regarding the proposal.



Based on the application of evidence to the applicable standards formally established in law, the LBC determined that annexation was warranted, albeit for a territory substantially smaller than that sought by the City. The Commission determined that the legal standards were best met at that time by limiting annexation to 4.58 square miles. The LBC amended the City's Petition to reduce the size of the territory and then approved the amended Petition. See *Statement of Decision in the Matter of the March 20 2000 Petition by the City of Homer for Annexation of Approximately 25.64 Square Miles*, Local Boundary Commission, December 26, 2001 ("Homer Decision").<sup>2</sup>

Six individuals or groups asked the Commission to reconsider its decision. The Commission met to address those requests. The LBC concluded that none of the requests provided a basis for it to reconsider the matter. Consequently, all requests were denied.

In January 2002, the Commission submitted the amended annexation proposal to the Alaska Legislature for its review under Article X, Section 12 of the Constitution of the State of Alaska.<sup>3</sup> What followed was a level of review of the proposal by the Legislature at the committee level that far exceeded the customary careful consideration of LBC boundary proposals.<sup>4</sup> Ultimately, the Legislature tacitly approved the action of the Commission by not vetoing the proposal in the manner allowed under the Constitution.

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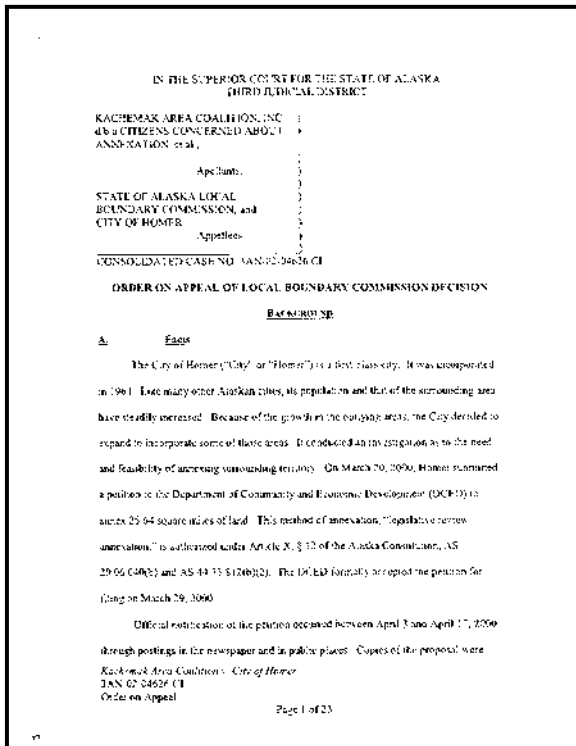
<sup>2</sup>A copy of the Homer Decision is included in this report as Appendix A.

<sup>3</sup>Article X, Section 12 states, in relevant part, that the Commission, "... may present proposed changes to the legislature during the first ten days of any regular session. The change shall become effective forty-five days after presentation or at the end of the session, whichever is earlier, unless disapproved by a resolution concurred in by a majority of the members of each house."

<sup>4</sup>The Community and Regional Affairs (CRA) Committee of each house is the standing committee that has jurisdiction over proposals by the Commission for municipal boundary changes subject to legislative review. At the time, both the Chair of the five-member Senate CRA Committee and one of the seven members of the House CRA Committee represented the territory within the boundaries of the City of Homer and the territory petitioned for annexation. The Senate and House CRA Committees met jointly regarding the annexation proposal on three occasions for a total of nearly seven hours. The House CRA Committee met on one additional instance regarding the proposed annexation for approximately 1.5 hours. Legislative review of the annexation proposal, in effect, ended when the House CRA Committee rejected a motion on a 6-1 vote to pass out of the Committee a resolution vetoing the annexation. The House CRA Committee Chair from Aniak cast the lone dissenting vote.

Following the requisite Federal Voting Rights Act review by the U.S. Justice Department, the 4.58-square mile annexation took effect March 20, 2002.

The Commission's action was appealed to the Superior Court by multiple parties. In December 2003, the Superior Court affirmed all aspects of the Commission's decision except one.



The Superior Court concluded that, the LBC had erred when it failed to consider the impact annexation would have on the Kachemak Emergency Service Area (“KESA”). KESA is a new service area created by the Kenai Peninsula Borough (“KPB” or “Borough”) shortly after the City filed its annexation Petition. The original boundaries of KESA encompassed an estimated 218.69 square miles, overlapping all but 0.26 of the 25.64 square miles petitioned for annexation.<sup>5</sup> The KPB added that 0.26 square-miles of territory to KESA’s boundaries shortly after KESA was created.

In rendering its decision in December 2003, the Superior Court remanded the City's amended annexation Petition to the Commission to discuss the impact of annexation on KESA. The Alaska Department of Law and the City of Homer

requested that the Court reconsider its decision. The Superior Court denied those requests.

Because the action taken by the Superior Court in this proceeding does not constitute final judgment, there was no automatic right to appeal. Alaska Rule of Appellate Procedure 402(b)(2) states, “Review is not a matter of right, but will be granted only where the sound policy behind the rule requiring appeals to be taken only from final judgments is outweighed . . . .” Neither the Alaska Department of Law nor the City petitioned the Supreme Court for review of the Superior Court remand.<sup>6</sup>

None of the current members of the Commission participated in the original annexation proceedings since all were appointed to their current terms after March 2002. When the

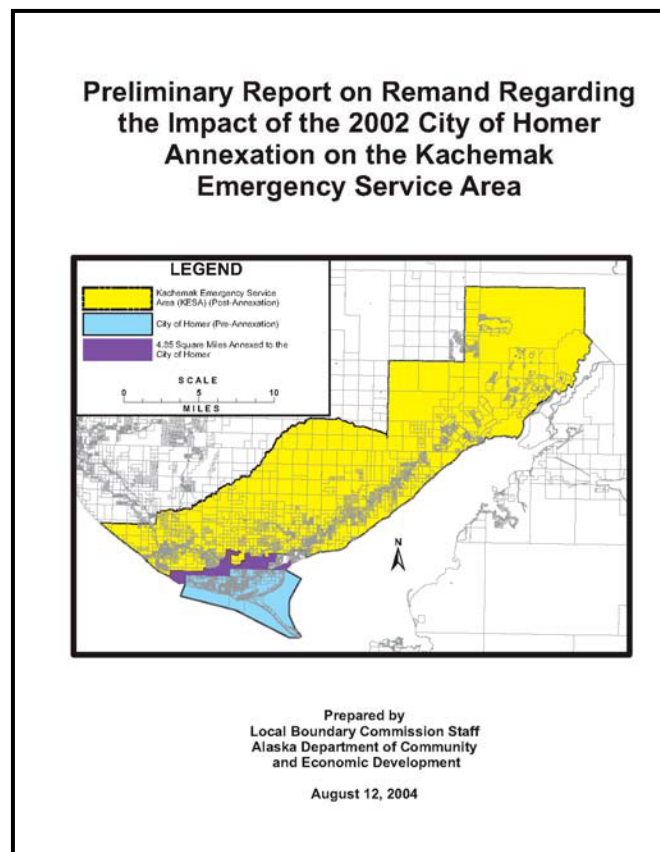
<sup>5</sup>The 0.26 square-mile territory is known as Millers Landing. That territory was apparently inadvertently excluded from KESA originally. Notwithstanding the exclusion, voters in Millers Landing had voted on the question of authorizing the Borough to exercise powers within the original boundaries of KESA.

<sup>6</sup>The Commission did not have an opportunity to timely consider the matter of seeking review of the Court's decision.

current members of the Commission were advised of the action taken by the Court, one member declared potential conflicts of interest. The Commissioner who declared the potential conflicts indicated that his recusal from the proceedings seemed warranted under the State Executive Branch Ethics Act and other applicable standards. He requested that the LBC Chair rule on the matter. In March 2004, after consulting with the Alaska Department of Law, the LBC Chair recused the Commissioner from the Homer annexation remand proceeding.

In May 2004, the four members of the Commission who will consider this matter adopted procedures for this remand proceeding. Those procedures require DCED to prepare this Remand Preliminary Report. The elements of this Remand Preliminary Report consist of the following:

**Chapter 1 – Background.** The first chapter describes the framework for matters relevant to this proceeding. It includes information about the constitutional origin of the Commission, the Commission’s duties and functions, fundamental requirements for LBC decisions, limitations on direct communications with the LBC, and biographical information about the current Commission members. It also includes information about the constitutional origin of the State’s local government agency and DCED’s role as staff to the Commission. Moreover, the first chapter provides information about the nature of local government in Alaska, with emphasis on the relationship between city and borough governments and the nature of borough service areas.



**Chapter 2 – Past, Ongoing, and Future Proceedings.** The second chapter provides information about proceedings relating to 4.58-square mile annexation to the City of Homer that took effect March 20, 2002. Included are details about the review of the original annexation proposal by the LBC, consideration of the proposed boundary change by the Alaska Legislature, review of the annexation by the U.S. Justice Department, formal implementation of the annexation, appeals to the Superior Court, and this remand proceeding.

**Chapter 3 – Analysis of the Issue on Remand.** The third chapter provides DCED’s preliminary examination of the issue on remand. Comments received from the public and the City of Homer regarding the remand are summarized. Prior recent decisions of the LBC regarding issues relating to city annexations versus borough service areas are also addressed. Additionally, the third chapter includes details regarding the creation of

KESA. Moreover, standards for annexation, the duty of the LBC to adopt such standards, and principles regarding judicial review of decisions by agencies with expertise are also addressed. Lastly, the third chapter takes up the effect of annexation on KESA.

**Chapter 4 – Conclusions and Recommendations.** The final chapter presents DCED’s preliminary conclusions and recommendations based on the information and analysis set out in the first three chapters.

The Superior Court indicated in its remand order that it “finds the lack of consideration given to the effect annexation would have on KESA troubling.” (*Kachemak Area Coalition v. City of Homer*, 3 AN-02-0426 CI (Alaska, December 4, 2003),<sup>7</sup> p. 21.) The Court noted that “there is much mention of KESA within both the DCED’s Preliminary and Final Reports as well as the whole record. However . . . [t]here is no indication any discussion took place regarding the impact annexation would have on the remainder of KESA.” (*Ibid.*, p. 20.) The Court concluded that, “a discussion of the effect annexation would have on surrounding services (sic) areas, was warranted to ensure that the annexation was indeed in the best interests of the state. There is no evidence that any such discussion ever occurred. Thus a remand is appropriate to ensure that the LBC considers this issue.” (*Ibid.*, p. 22.)

In remanding this issue to the LBC, DCED believes the Court has, in effect, created and imposed a new city annexation standard. Implicit in that new standard is a provision that annexation of a portion of a borough service area to a city can satisfy the “best interests of the state”<sup>8</sup> requirement only if the annexation has no significant adverse effect on the remnant service area.<sup>9</sup>

As occurred in this case, it is not uncommon for new borough service areas to be created or expanded in response to the prospect of city annexations. The Commission members that rendered the Homer decision were well aware of that circumstance. Those Commission members were equally aware of the constitutional and statutory preference for city annexation versus creating a new service area.

It is an issue with which a majority of those particular Commission members had grappled in three prior cases as discussed in Chapter 3 of this Report. In one of those prior cases, annexation critics argued – as is implicit in the new standard imposed by the Court in the Homer remand proceeding – that borough service areas are constitutionally preferred over (or on par with) city annexation. The distinguished Victor

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<sup>7</sup>A copy of *Kachemak Area Coalition v. City of Homer* is included in this Preliminary Report as Appendix B. That remand order will be hereinafter cited to as the *Homer Remand Order*.

<sup>8</sup>See AS 29.06.040(a), 3 AAC 110.135, and 3 AAC 110.980.

<sup>9</sup>While not explicit in the order, it appears that the corollary to the remand issue is that if there is a significant adverse effect on KESA, then the LBC’s approved annexation to the City is voidable.

Fischer, one of the paramount experts in Alaska's Constitution and local government,<sup>10</sup> advised the Commission that:

The position that establishment of new service areas is the constitutionally preferred alternative to city annexation or on par with cities is completely wrong, it's nonsense. There is no basis whatsoever to support that view. All provisions of Article X make it totally obvious that there are two preferred types of local government units under Alaska's constitution: cities and boroughs. Service areas are subsidiary units of boroughs. Section 5 unequivocally establishes that annexation is a preferred alternative to creation of a new service area.

Victor Fischer, September 29, 1997, letter, p 1-2.

In its Homer Decision, the LBC concluded as follows (p. 29):

The legal ability of the [KPB] to provide services to the territory proposed for annexation is circumscribed by the provisions of Article X, § 5 of the Constitution of the State of Alaska and AS 29.35.450(b). Accordingly, no overriding significance is ascribed to the establishment of the Kachemak Emergency Service Area with respect to the capability of the Kenai Peninsula Borough to serve the territory proposed for annexation.

The Commission's decision to allow annexation of 4.58 square miles, notwithstanding concerns expressed by annexation opponents regarding the impact on KESA, involved expertise regarding both a complex subject matter and fundamental policy formulation. By compelling the LBC to address the imposed new standard, the Superior Court has substituted its judgment for that of the Commission. Under long-established principles, deference should have been given to the LBC's judgment under those circumstances. *See Keane* at 1241; *Lake and Peninsula Borough v. Local Boundary Commission*,

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<sup>10</sup>Mr. Fischer is recognized by the Alaska Supreme Court as "an authority on Alaska government." (*Keane v. Local Boundary Commission*, 893 P.2d 1239, 1244 (Alaska 1995).) He received a bachelor's degree from the University of Wisconsin in 1948 and a Master's Degree in Community Planning from the Massachusetts Institute of Technology in 1950. In 1955, Mr. Fischer was elected as a delegate to the Alaska Constitutional Convention held in 1955-1956. During the convention, Mr. Fischer served on both the Committee on Local Government and the Style and Drafting Committee; he held the position of Committee Secretary on the former. In 1961-1962, Mr. Fischer received the Littauer Fellowship in public administration from Harvard University. Mr. Fischer has held several planning related positions in Alaska. He has written and co-authored a number of books and publications concerning state and local government in Alaska. These include *The State and Local Governmental System* (1970), *Borough Government in Alaska* (1971), *Alaska's Constitutional Convention* (1975), and *Alaska State Government and Politics* (1987). Mr. Fischer served in Alaska's Territorial House of Representatives (1957-1959) and the Alaska State Senate (1981-1986). He was a member of the faculty of the University of Alaska Fairbanks and of the University of Alaska Anchorage. At the University, he was primarily associated with the Institute for Social and Economic Research (ISER), where he was director for ten years.

885 P.2d 1059,1062 (Alaska 1994); *Mobil Oil Corp. v. Local Boundary Commission*, 518 P.2d 92,97-8 (Alaska 1974).

As outlined in detail in Chapters 1 and 3, the imposed new standard created by the Court in its remand order is strikingly inconsistent with the clear preference set out in Alaska's Constitution and Statutes for city annexation over creation of a new borough service area. Accordingly, it would be improper to apply that standard here or in any future annexation proceeding.<sup>11</sup>

The former LBC member who was Chair of the Commission<sup>12</sup> throughout the original Homer annexation proceeding expressed similar views regarding these issues:

[T]he legal premises underlying Judge Rindner's decision to remand are unsettling in several respects. As best I can tell, the ruling that the Commission **must** explicitly consider annexation impacts on a remnant service area as part of its determination of the "best interests of the state" has no constitutional, statutory, or regulatory foundation. Further, it appears to run counter to a previous Alaska Supreme Court decision requiring the Commission to ground its decisions on regulatory provisions. This matters greatly on both counts.

First, Judge Rindner's ruling will have implications for many proposed city annexations. City annexation proposals frequently impinge on adjacent service area boundaries. Recent examples include annexation proposals by the cities of Ketchikan, Kodiak, and Haines.<sup>13</sup>

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<sup>11</sup>Even assuming, *arguendo*, that the imposed new standard complied with the Alaska Constitution and Statutes, the Commission is obligated to adopt annexation standards in regulation (AS 44.33.812(a)(2)). Adoption of such a standard by the Commission would be subject to the regulation adoption provisions of the Administrative Procedure Act (AS 44.62) (APA). DCED questions whether the due-process requirements of the APA would be violated if the LBC considers the imposed new standard without its adoption as a regulation.

<sup>12</sup>Kevin Waring was appointed to the Commission on July 15, 1996, and served as LBC Chair from July 10, 1997 until March 1, 2003. DCED considers Mr. Waring to have considerable expertise regarding local government in Alaska. In addition to his service on the Commission, he has had a distinguished career in other local and state governmental affairs in Alaska. He was the first director of the Division of Community Planning in the former Alaska Department of Community and Regional Affairs (1973-1978). Between 1980 and the spring of 1998, he operated a planning/economics consulting firm in Anchorage. From the spring of 1998 until early 2000, Mr. Waring was employed as manager of physical planning for the Municipality of Anchorage's Community Planning and Development Department. He has since returned to private consulting. Mr. Waring has been active on numerous Anchorage School District policy and planning committees and boards of the Municipality of Anchorage.

<sup>13</sup>Footnote 3 in original. The Commission's decision statements in those cases offer a principled and consistent analysis of issues stemming from city annexation of service areas.

Second, Judge Rindner's ruling that the Commission **must** consider a factor that is not codified in law or regulation is inventive.<sup>[14]</sup> It effectively nullifies the protection that established standards afford to all parties in a proceeding. It exposes the Commission and others to unforeseeable second-guessing. If left unchallenged, it invites mischief in future city annexation proceedings.

. . . No law or regulation requires the Commission to address the impacts of annexation on a service area or remnant service area.

Review of relevant statutes and regulations indicates that this lack is considered and purposeful, and reflects a consistent public policy posture on the relative status of city and borough municipalities and service areas . . . .

. . . .

Clearly, the Alaska Constitution and the Alaska legislature, and the Commission following their lead, have a heightened regard for municipalities compared to their service areas.

Judge Rindner's remand decision is problematic in light of two other Alaska Supreme Court decisions.

. . . .

. . . Judge Rindner's ruling seemingly stands the Alaska Supreme Court's ruling in U.S. Smelting on its head by requiring the commission to address an extra-regulatory standard.<sup>[15]</sup>

Also puzzling is why Judge Rindner applied "independent judgment" rather than the "reasonable basis test" to the issue of whether the Commission properly considered impacts on the KESA, especially given his cite of and quotes from Mobil Oil Corp.. . . .<sup>[16]</sup>

Kevin Waring, responsive comments, June 24, 2004, pp. 2 - 4.

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<sup>14</sup>Footnote 4 in original. The Commission's **discretionary** authority to consider any facts it deems relevant is not here in question. This discretionary authority is implied by AS 29.06.040 which states that the commission **may** (not must) accept a proposed annexation that satisfies applicable statutory and regulatory standards.

<sup>15</sup>*United States Smelting, Refining and Mining Company v. Local Boundary Commission*, 489 P.2d 140 (Alaska 1971), hereinafter referred to as "*Nome*".

<sup>16</sup>*Mobil Oil*, *supra*.

The Commission has jurisdiction over city annexations; it has no jurisdiction over borough service areas. Those who created KESA with boundaries encompassing all of the territory petitioned for annexation bear sole responsibility for any concerns regarding adverse effects of annexation on KESA. KESA's creators acted notwithstanding the constitutional and statutory limitations on the creation of new service areas. KESA was formed after the City of Homer petitioned for annexation. Those who created KESA were well aware of the pending annexation proposal. Well before KESA was created, the prospect was widely recognized that all or some portion of the 25.64-square mile portion of the proposed service area would be removed as a result of annexation to the City.<sup>17</sup>

The annexation of 4.58 square miles has been derisively characterized as "cherry-picking" KESA because the territory is more densely populated and has a greater per-capita tax base compared to the remainder of KESA. Those who portray the City's and Commission's actions as such must be unfamiliar with the "limitation-of-community doctrine." (See *Mobil Oil* at 100.) That doctrine restricts the jurisdictional boundaries of city governments to more urban and developed territories. On average, the boundaries of city governments in Alaska encompass only about 27 square miles.

The limitation-of-community doctrine is a foundation upon which the legal standards for city annexation have been developed. For those familiar with the doctrine, it comes as no surprise that application of the annexation standards by the LBC resulted in annexation of only a 4.58-square-mile portion of the KESA's 218.95 square miles. Given the limitation-of-community doctrine, it is not at all remarkable that the 4.58-square mile annexed territory is more densely inhabited and has a higher per capita tax base compared to the 214.37-square mile remnant area of KESA.

The allegation of "cherry picking" KESA and the Court's reliance on that argument in its remand decision is baseless. Aside from the view held by DCED and others that inclusion in KESA of territory that was annexed to the City violated Alaska's Constitution<sup>18</sup> and Statutes and assuming for the sake of argument that "cherry-picking" could be at issue in an annexation or incorporation proceeding, in this case the very history of the City's annexation effort vis-à-vis the creation of KESA militates against

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<sup>17</sup>Clearly, the prospect exists that some day, additional portions of the remnant KESA will be annexed to the City of Homer. In a broader context, all service areas in every organized borough remain subject to boundary changes from city annexations and city incorporations.

<sup>18</sup>DCED observed in its Annexation Preliminary Report (p. 306):

The Kachemak Emergency Service Area was established in October 2000, more than six months after the City . . . filed its annexation petition. To date, there has been no formal legal challenge over the creation of the service area in terms of the previously noted limitations set out in Article X, Section 5 of the Constitution and AS 29.35.450(b).

Moreover, during the legislative review of the proposal, the Director of Legal Services for the Legislative Affairs Agency cited Article X, Section 5 of Alaska's Constitution and noted that KESA, "was probably invalidly established." (Memorandum from Tamara Brandt Cook, January 9, 2002, p. 2.)

such claim. There was no KESA to cherry-pick when the City began its annexation effort. The City's consideration of annexing the territory formally began on December 13, 1999; the Petition was submitted March 20, 2000; accepted for filing by DCED on March 29, 2000; and public notice thereof issued April 3, 2000. All these events predated the establishment of KESA. The first signature on a petition to create KESA was dated April 12, 2000. Following the election regarding that creation, the KPB approved the formation on August 15, 2000. By that time, the City's formal annexation effort was nine months old.

It was the Commission's decision, and the Legislature's approval thereof, that narrowed the size of the territory being annexed. That decision was based on the strictures of Alaska's Constitution and Statutes and application of the Commission's 14 annexation standards, which are law and adopted under mandate from the Alaska Legislature and the Alaska Supreme Court.

Applying the law (i.e., the annexation standards) to the City's Petition, the Commission determined that the State's best interest was served by approving only about one-fifth of the territory requested by the Petitioner. The Legislature tacitly approved that determination. As long as a Commission decision has a reasonable basis of support for the LBC's reading of the standards and its evaluation of the evidence, the decision should be affirmed by the Court.<sup>19</sup> However, rather than so affirming, the Court imposed a new standard in this instance.

It is difficult for DCED to reconcile the role of the Court with its imposition of a new standard into the consideration of public-policy issues involving annexation. The Alaska Constitution created the Commission "to provide an objective administrative body to make state-level decisions regarding local boundary changes, thus avoiding the chance that a small, self-interested group could stand in the way of boundary changes which were in the public interest."<sup>20</sup> The Alaska Supreme Court also stated: "The policy decision as to . . . annexation is an exercise of lawfully vested administrative discretion which we will review only to determine if administrative, legislative or constitutional mandates were disobeyed or if the action constituted an abuse of discretion."<sup>21</sup> Here, the Court takes the opposite approach. In its new standard, the Court ignores the constitutional and statutory preference for annexation over creation of service areas and rewrites the law to, in effect, supersede that preference.

In *Nome*, the Alaska Supreme Court stated:

Without doubt there are questions of public policy to be determined in annexation proceedings which are beyond the province of the court. Examples are the desirability of annexation, as expressed in published

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<sup>19</sup> *Mobil Oil* at 98; *Keane* at 1241.

<sup>20</sup> *Port Valdez Co. v. City of Valdez*, 522 P.2 1147, 1150 (Alaska 1974).

<sup>21</sup> *Port Valdez* at 1151.

standards. Judicial techniques are not well adapted to resolving these questions. In that sense, these may be described as political questions," beyond the compass of judicial review.

*Nome* at 143, emphasis added.

In accordance with Article X, Sections 5 and 12 of the Alaska Constitution, AS 29.06.040 - .060, and AS 44.33.812(a), the Commission has provided such published annexation standards (3 AAC 110.090 - 3 AAC 110.150 and 3 AAC 110.900 - 3 AAC 110.910). Based on the conclusions in *Nome*, *supra*, DCED believes the Court's creation of the new implied standard is "beyond the compass" of its authority and proper role.

As discussed more fully in Chapter 3, the issue of a court exceeding its authority has been addressed in numerous cases. The U.S. Supreme Court has stated that, "The responsibilities for assessing the wisdom of . . . policy choices and resolving the struggle between competing views of the public interest [in this instance, annexation versus service area creation] are not judicial ones: 'Our Constitution vests such responsibilities in the political branches' [i.e., the executive (Commission) and the legislative (Legislature)]."<sup>22</sup>

A 1981 decision by the Alaska Supreme Court dealt precisely with the issue of the court's role in a dispute stemming from city annexation. The case involved the question whether annexation to the City of Haines resulted in an increased municipal tidelands entitlement from the State.<sup>23</sup> The Alaska Department of Natural Resources (DNR) urged the Court to reject Haines' claim for the increased entitlement, in large part, on public policy grounds. DNR was particularly concerned that if Haines prevailed, it would "open the door to municipal speculation in the ownership of tidelands" through annexation (*Haines* at 1050). The City of Haines stressed that annexation was subject to approval by the LBC, which would apply standards (*Haines* at 1051). The Alaska Supreme Court balked at a policy-making role urged by DNR. It noted that annexation decisions are rendered by the LBC and reviewed by the Legislature (*Haines* at 1051, n. 18). The Court stated, "As to the public policy arguments, they are better addressed to the legislature; that body has ample opportunity to consider them . . . in its review of each municipal expansion . . . ."

Notwithstanding DCED's strong conviction that the new standard imposed by the Court in this remand proceeding is improper, in compliance with the Court's directive and to bring this proceeding to a final judgment, DCED has addressed the issue raised by the Court. DCED concludes from the facts in this proceeding that even though the 4.58 square mile territory approved for annexation is more densely populated and has a

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<sup>22</sup>*Chevron U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837, 866 (1984).

<sup>23</sup>*Alaska, Department of Natural Resources v. City of Haines*, 627 P.2d 1047. With regard to service areas, however, the Legislature's actions are also constrained by Article X, Section 5 of the Alaska Constitution.

higher tax base than the 214.37 square-mile remnant service area, annexation has certainly not rendered KESA unfeasible.

As constituted after Millers Landing was added, but before annexation took effect, the 218.95 square miles within KESA's boundaries were inhabited by an estimated 5,032 residents. The taxable value of that territory was \$238,585,300 as of January 1, 2002, \$1,089,679 per square mile. Annexation reduced the size of KESA to 214.37 square miles, its population to 4,134, and its property tax base to \$177,162,069. In relative terms, the KESA's geographic size was reduced by 2 percent; its population was cut by 17.8 percent, and its tax base declined by 25.7 percent.

Before annexation, the population density of KESA was nearly 23 residents per square mile. The population density of the post-annexation boundaries of KESA dropped to 19.3 residents per square mile. While it declined by roughly 16 percent, KESA's population density post-annexation population density was comparable to two other emergency service areas in the Borough (Anchor Point Fire and EMS, and Central Emergency Services, both at 19.7 residents per square mile). Moreover, KESA's population density was far greater than two other fire or emergency service areas of the Borough (Central Emergency Medical Service Area at 1.9 persons per square mile, and Nikiski Fire at 1 person per square mile).

Before annexation, KESA's property tax base was approximately \$47,414 per resident. After annexation, the figure declined to approximately \$42,855 per resident, a drop of 9.6 percent. The post-annexation figure is 7 percent less than the \$46,165 per resident for the KPB's Bear Creek Fire Service Area as of January 1, 2002.

Before annexation, each of the 218.95 square miles within KESA held, on average, \$1,089,679 in taxable property. After annexation, that figure dropped to \$826,429 per square mile. However, the figure for KESA remained substantially greater than the comparable measure for three of five other service areas. The figure for KESA following annexation was also substantially greater compared to the average for all five of those service areas.

DCED considers population density, per-capita property-tax figures, and valuation density to be fundamental measures of the viability of providing municipal services in this case. While those measures declined for KESA following annexation to the City, they are certainly not abnormal when compared to other fire protection and emergency service areas within the KPB at the time. The measures are comparable or, in many cases, favorable to other KPB service areas. Obviously, KESA has continued to operate over multiple budget cycles following annexation of the 4.58 square miles to the City. Even the Court seems to recognize that KESA remains viable based on the conclusion at page 20 of the remand order where it states, "KESA was created and will continue to exist even if Homer annexes a portion of it." Thus, DCED concludes that KESA has remained viable following annexation of territory to the City.

Based on the foregoing, DCED recommends that the LBC discuss the effect of annexation on KESA and the limitations in Alaska's Constitution and Statutes on the creation of new service areas. DCED urges the Commission to affirm the

December 26, 2001, Homer decision granting annexation of 4.58 square miles to the City. Further, DCED recommends that the Commission reject as unconstitutional and otherwise unlawful the new Court-imposed standard that the effect of city annexation on existing or prospective borough service areas must be considered in determining the best interests of the state.



## CHAPTER 1 - BACKGROUND

### ***Section A. Local Boundary Commission***

#### **Subsection 1. Constitutional Foundation of the Commission.**

The framers of Alaska's Constitution adopted the principle that, "unless a grave need existed, no agency, department, commission, or other body should be specified in the constitution." (Victor Fischer, *Alaska's Constitutional Convention*, 1975, p. 124.) Thus, by providing for the LBC in Article X, Section 12 of the Constitution, the fifty-five elected delegates who drafted Alaska's Constitution nearly five decades ago recognized that establishment of municipal governments and alteration of their boundaries was of crucial importance to future State of Alaska.<sup>24</sup>

The LBC is one of only five State boards and commissions established in the Constitution (among a current total of 120 active boards and commissions).<sup>25</sup> The Alaska Supreme Court, in the third-year of statehood, characterized the framers' purpose in creating the LBC as follows:

An examination of the relevant minutes of [the Local Government Committee of the Constitutional Convention] shows clearly the concept that was in mind when the local boundary commission section was being considered: that local political decisions do not usually create proper boundaries and that boundaries should be established at the state level. The advantage of the method proposed, in the words of the committee:

. . . lies in placing the process at a level where area-wide or state-wide needs can be taken into account. By placing authority in this third party, arguments for and against boundary change can be analyzed objectively.

*Fairview Public Utility District at 543.*

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<sup>24</sup>Article X, Section 12 states, in full:

A local boundary commission or board shall be established by law in the executive branch of state government. The commission or board may consider any proposed local government boundary change. It may present proposed changes to the Legislature during the first ten days of any regular session. The change shall become effective forty-five days after presentation or at the end of the session, whichever is earlier, unless disapproved by a resolution concurred in by a majority of the members of each house. The commission or board, subject to law, may establish procedures whereby boundaries may be adjusted by local action.

<sup>25</sup>The other four boards or commissions named in the Constitution are the Commission on Judicial Conduct, the Judicial Council, the University of Alaska Board of Regents, and the Redistricting Board for apportionment of the Alaska Legislature.

A 1971 study of state and local relations by the University of Alaska Institute of Social, Economic and Government Research (ISEGR)<sup>26</sup> provides additional background concerning the constitutional foundation of the Local Boundary Commission. The study noted:

The Local Government Committee and the convention concluded that establishment and revision of local government boundaries should be primarily a state responsibility. Several considerations led to this conclusion: first, the delineation of boroughs required a statewide analysis of pertinent considerations; second, the state had a direct interest, since the borough was to serve not only as a local government but also as a unit for the provision of state services; third, it was generally believed that an objective analysis of relationships between adjacent local units could only be made at a higher level; and fourth was the belief that strictly local political decisions do not usually create proper boundaries.<sup>[27]</sup> Because similar considerations applied, city boundaries were also included under the jurisdiction of a boundary commission or board to be established in the executive branch of the state government. Boundary changes under this system could be made by the commission upon petition or on its own initiative.<sup>[28]</sup>

Convention delegates from the beginning considered it appropriate that boundary changes proposed by the commission be subject to legislative veto. In addition, there was some feeling on the part of the Local Government Committee “that the citizens of a local unit should have some check upon any proposed revision.”<sup>[29]</sup> The issue was again raised on the convention floor,<sup>[30]</sup> but no requirement for a referendum was included in the constitution.

Initially, the Local Government Committee draft article stipulated that proposed changes be submitted to the legislature during the first ten days of any session and that they would “become effective at the end of the session unless disapproved by a resolution concurred in by a majority of all members of each house.”<sup>[31]</sup> Subsequently, it was further

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<sup>26</sup>The Institute of Social, Economic and Government Research (ISEGR) is now ISER.

<sup>27</sup>Footnote 50 in original. *Minutes*, 18<sup>th</sup> Meeting; *General Discussion*, pp. 6-7. [Note: “Minutes” refers to *Minutes of the Committee on Local Government*, Alaska Constitutional Convention (1955 -1956). “General Discussion” refers to *General Discussion of Local Government Under Proposed Article*, Committee on Local Government, Alaska Constitutional Convention (December 19, 1955).]

<sup>28</sup>Footnote 51 in original. *Minutes*, 19<sup>th</sup> Meeting; *General Discussion*, p. 6.

<sup>29</sup>Footnote 52 in original. *Minutes*, 18<sup>th</sup> Meeting.

<sup>30</sup>Footnote 53 in original. *Proceedings*, pp. 2667, 2752. [Note: “Proceedings” refers to *Alaska Constitutional Convention Proceedings*, November 1955 to February 1956 (Juneau, 1956).]

<sup>31</sup>Footnote 54 in original. *Committee Proposal/6/a*.

provided that a change would be “effective forty-five days after presentation or at the end of the session, whichever is earlier . . . ”<sup>[32]</sup> This amendment was adopted so that acceptable changes would not be unnecessarily delayed because of prolonged legislative sessions.

While the legislature is thus given the veto power over boundary revisions and is also required to prescribe standards and methods for establishment of boroughs, the constitution does not grant it authority over Boundary Commission activities<sup>[33]</sup> or over the manner in which boundary changes are effected. The Boundary Commission in addition has the authority, subject to law, to “establish procedures whereby boundaries may be adjusted by local action.”<sup>[34]</sup>

Thomas A. Morehouse and Victor Fischer, *Borough Government in Alaska*, 1971, pp. 51 - 53.<sup>35</sup>

## **Subsection 2. Duties and Functions of the Local Boundary Commission.**

The LBC acts on proposals for seven different municipal boundary changes. These are:

- incorporation of municipalities;<sup>36</sup>
- reclassification of city governments;
- annexation to municipalities;
- dissolution of municipalities;
- detachment from municipalities;

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<sup>32</sup>Footnote 55 in original. *Constitution*, Article X, Section 12.

<sup>33</sup>Footnote 56 in original. *Proceedings*, p. 2750.

<sup>34</sup>Footnote 57 in original. *Constitution*, Article X, Section 12. It would appear questionable, therefore, whether the legislature has any direct or implied constitutional power to authorize annexation or other boundary changes by local action, since this power rests in the boundary commission.

<sup>35</sup>*Borough Government in Alaska* has been cited by the Alaska Supreme Court as an authoritative reference in two cases involving the Local Boundary Commission. See *Mobil Oil* at 98 and *Keane* at 1242, 1243.

Mr. Morehouse, who co-authored the study with Victor Fischer, was a full-time faculty member at the Institute of Social, Economic, and ISEGR/ISER from 1967 to 1994. He has extensively studied Alaska government and public policy. Mr. Morehouse has written or co-authored numerous books and articles on state and local government in Alaska. Those books include *Manpower Needs In Alaska State & Local Government* (1970), *Borough Government in Alaska* (1971), *Alaska's Urban and Rural Governments* (1984), *Alaska State Government and Politics* (1987), and *Alaska Politics and Government* (1994).

Mr. Fischer's background regarding municipal government in Alaska is summarized in n. 10.

<sup>36</sup>The term “municipalities” includes both city governments and borough governments.

- merger of municipalities; and
- consolidation of municipalities.

In addition to the above, the LBC has a continuing obligation under statutory law to:

- make studies of local government boundary problems;
- adopt regulations providing standards and procedures for municipal incorporation, annexation, detachment, merger, consolidation, reclassification, and dissolution; and
- make recommendations to the Legislature concerning boundary changes under Article X, Section 12 of Alaska's Constitution.

Further, the LBC is routinely assigned duties by the Legislature. For example, in February 2003, the Commission produced the 216-page report entitled *Unorganized Areas of Alaska that Meet Borough Incorporation Standards*. That report was prepared in response to the directive in Section 3 Chapter 53 SLA 2002. In February 2004, the Commission and Department of Education and Early Development published a 330-page joint report entitled *School Consolidation: Public Policy Considerations and a Review of Opportunities for Consolidation*. That report was prepared in response to the duty assigned in Section 1 Chapter 83 SLA 2003. The 2004 Legislature called for “a Local Boundary Commission project to consider options for forming a separate local government, independent of the Municipality of Anchorage, for the community of Eagle River” (Section 48 Chapter 159 SLA 2004).

### **Subsection 3. LBC Decisions Must Have a Reasonable Basis and Must Be Arrived at Properly.**

LBC decisions regarding petitions that come before it must have a reasonable basis. That is, both the LBC's interpretation of the applicable legal standards and its evaluation of the evidence in the proceeding must have a rational foundation.<sup>37</sup>

The LBC must, of course, act within its jurisdiction; conduct a fair hearing; and avoid any prejudicial abuse of discretion. Abuse of discretion occurs if the LBC has not proceeded in the manner required by law or if the evidence does not support its decision.

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<sup>37</sup> See *Keane* at 1239, 1241. When an administrative decision involves expertise regarding either complex subject matter or fundamental policy formulation, the court defers to the decision if it has a reasonable basis; *Lake and Pen.* at 1062; *Mobil Oil Corp.* at 97-8. Where an agency action involves formulation of a fundamental policy the appropriate standard on review is whether the agency action has a reasonable basis; LBC exercises delegated legislative authority to reach basic policy decisions; acceptance of the incorporation petition should be affirmed if court perceives in the record a reasonable basis of support for the LBC's reading of the standards and its evaluation of the evidence; *Rose v. Commercial Fisheries Entry Comm'n*, 647 P.2d 154, 161 (Alaska 1982) (review of agency's exercise of its discretionary authority is made under the reasonable basis standard) cited in *Stosh's I/M v. Fairbanks North Star Borough*, 12 P.3d 1180, 1183 nn. 7 and 8 (Alaska 2000); see also *Matanuska-Susitna Borough v. Hammond*, 726 P.2d 166, 175-76 (Alaska 1986).

#### **Subsection 4. Limitations on Direct Communications with the LBC.**

When the LBC acts on a petition for a municipal boundary change, it does so in a quasi-judicial capacity. LBC proceedings regarding a municipal boundary change must be conducted in a manner that upholds the right of everyone to due process and equal protection.

Ensuring that communications with the LBC concerning municipal boundary proposals are conducted openly and publicly preserves rights to due process and equal protection. To regulate communications, the LBC adopted 3 AAC 110.500(b), which expressly prohibits private (ex parte) contact between the LBC and any individual, other than its staff, except during a public meeting called to address a municipal boundary proposal. The limitation takes effect upon the filing of a petition and remains in place through the last date available for the Commission to reconsider a decision. If a decision of the LBC is appealed to the court, the limitation on ex parte contact is extended, as in this case, in the event that the court requires additional consideration by the LBC.

In that regard, all communications with the Commission must be submitted through its staff. The LBC Staff may be contacted at the following address, telephone number, facsimile number, or e-mail address.

Local Boundary Commission Staff  
550 West Seventh Avenue, Suite 1770  
Anchorage, Alaska 99501-3510

Telephone: (907) 269-4559 or 269-4594  
Fax: (907) 269-4539  
Alternate fax: (907) 269-4563  
E-mail: LBC@commerce.state.ak.us

#### **Subsection 5. LBC Membership.**

The LBC is an autonomous commission. The Governor appoints members of the LBC for five-year overlapping terms. (AS 44.33.810.) Notwithstanding the prescribed length of their terms, however, members of the Commission serve at the pleasure of the Governor. (AS 39.05.060(d).)

The LBC is comprised of five members. One member is appointed from each of Alaska's four judicial districts. The fifth member is appointed from the state at-large and serves as Chair of the Commission.

State law provides that LBC members must be appointed "on the basis of interest in public affairs, good judgment, knowledge and ability in the field of action of the department for which appointed, and with a view to providing diversity of interest and points of view in the membership." (AS 39.05.060.)

LBC members receive no pay for their service on the Commission. However, they are entitled to reimbursement of travel expenses and per diem authorized for members of boards and commissions under AS 39.20.180.

The following is a biographical summary of the current members of the LBC. Commissioner Bob Hicks has been recused from the Homer annexation remand proceeding.



**Darroll Hargraves, Chair, At-Large Appointment, Wasilla**

Governor Murkowski appointed Darroll Hargraves of Wasilla Chair of the LBC in March 2003. Commissioner Hargraves holds a Masters degree and an Education Specialist degree from the University of Alaska, Fairbanks. Additionally, Oakland City University awarded him the Doctor of Humane Letters.

Commissioner Hargraves has been School Superintendent in Nome, Ketchikan, and Tok. He was the Executive Director of the Alaska Council of School Administrators from 1998 to 2002. He is currently a management/communications consultant working with school districts and nonprofit organizations. Commissioner Hargraves previously served as Chair of the LBC from 1992-1997 under Governors Hickel and Knowles. His current term on the Commission expires January 31, 2008.



**Georgianna Zimmerle, First Judicial District, Ketchikan**

Georgianna Zimmerle serves from the First Judicial District. She is a resident of Ketchikan. Governor Murkowski appointed Commissioner Zimmerle to the Commission on March 25, 2003. An Alaska Native, Commissioner Zimmerle is Tlingit and Haida. She is currently the General Manager for the Ketchikan Indian Community. She worked for the Ketchikan Gateway Borough for 27 years, serving five years as the Borough Manager and 22 years in the Borough Clerk's Office. Her current term on the Commission expires January 31, 2006.



**Robert Harcharek, Second Judicial District, Barrow**

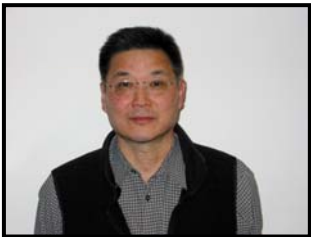
Robert Harcharek serves from the Second Judicial District. Governor Knowles appointed him to the LBC on July 18, 2002. Mr. Harcharek has lived and worked on the North Slope for more than 20 years. He has been a member of the Barrow City Council since 1993 and a member of the North Slope Borough School Board since 1999. He is a Senior Planner and Social Science Researcher for the North Slope Borough Planning Department. Mr. Harcharek earned a Ph.D. in International and Development Education from the University of Pittsburgh in 1977. He has served as North Slope Borough Capital Improvement Projects and Economic Development Planner, Community Affairs Coordinator for the North Slope Borough Department of Public Safety, Director of the North Slope Higher Education Center, Socio-cultural Scientist for the North Slope Borough Department of Wildlife Management, Director of Technical Assistance for Upkeagvik Inupiat

Corporation, and Dean of the Inupiat University of the Arctic. Mr. Harcharek served for two years as a Peace Corps Volunteer in Thailand and was also a Fulbright-Hays Professor of Multicultural Development in Thailand. He is a member of numerous boards of directors, including the Alaska Association of School Boards and the Alaska Municipal League Legislative Committee. His current term on the Commission expires January 31, 2009.



**Bob Hicks, Vice-Chair, Third Judicial District, Seward**

Governor Murkowski appointed Bob Hicks to the LBC from the Third Judicial District in March 2003. His fellow commissioners elected him as Vice-Chair of the LBC. Commissioner Hicks is a graduate of Harvard Law School. From 1972 - 1975, he served as Executive Director of the Alaska Judicial Council. He practiced law in Alaska from 1975 - 2001. One of the fields in which he specialized as an attorney was the field of local government, including Local Boundary Commission matters. Since 2001, Commissioner Hicks has served as the Director of Corporate Affairs and the Dive Officer at the Alaska SeaLife Center in Seward. Commissioner Hicks' current term on the LBC expires January 31, 2007.



**Dr. Anthony Nakazawa, Fourth Judicial District, Fairbanks**

Anthony "Tony" Nakazawa serves from the Fourth Judicial District and is a resident of Fairbanks. He was appointed to the LBC on February 14, 2003. Commissioner Nakazawa is employed as the State Director of the Alaska Cooperative Extension Service, USDA/University of Alaska Fairbanks, which includes district offices in ten communities throughout Alaska. He previously served as the director of the Division of Community and Rural Development for the Alaska Department of Community and Regional Affairs under Governor Walter J. Hickel. Commissioner Nakazawa, an extension economist and UAF professor, has been with the Cooperative Extension Service since 1981 and with the Hawaii Cooperative Extension system in 1979-1980. From 1977-1979, he served as the Economic Development Specialist for the Ketchikan Gateway Borough. His past activities include board service with the Alaska Rural Development Council, RurAL CAP, Alaska Job Training Council, and Asian-Alaskan Cultural Center. Commissioner Nakazawa received his B.A. in economics from the University of Hawaii Manoa in 1971 and his M.A. in urban economics from the University of California Santa Barbara in 1974. He received his M.S. (1976) and Ph.D. (1979) in agriculture and resource economics from the University of California Berkeley. His current term on the Commission expires January 31, 2005.

## **Section B. Alaska Department of Community and Economic Development.**



### **Subsection 1. Constitutional Origin of the Local Government Agency.**

As noted in the preceding discussion (Chapter 1 Section A-1 – “Constitutional Foundation of the Local Boundary Commission”), the framers of Alaska's Constitution followed a principle that no specific agency, department, board, or commission would be named in the Constitution “unless a grave need existed” for such. In addition to the five previously-noted boards and commissions named in the Constitution, the framers provided for just one State agency – an agency to “advise and assist local governments . . . review their activities, collect and publish local government information, and perform other duties prescribed by law.” The basis for the constitutionally-mandated local government agency is described in the previously noted 1971 ISEGR study of state and local relations as follows:

The prominence that the convention gave to the state role in local affairs is evidenced by the fact that the “local government agency” is the only administrative agency specifically required under the constitution. Delegates generally subscribed to the principle that, unless a grave need existed, no agency, department, commission, or other body be specified in the constitution. As one delegate stated in regard to the local government agency, “Unless there is some very, very compelling reasons given for including such an agency as proposed in Section 14 in the constitution, I think we're violating the principles and policies we've already adopted here.”<sup>[38]</sup> However, in view of the general belief that success of the local government plan was dependent upon existence of an effective agency at the state level, provision for a mandatory agency was included in the constitution.

Thus, Section 14 of Article X, establishing the local government agency, provides:

An agency shall be established by law in the executive branch of the state government to advise and assist local governments. It shall review their activities, collect and publish local government information, and perform other duties prescribed by law.

The general intent was to establish an administrative agency that would help assure that the new local government system became operative and that state responsibility for local affairs was properly discharged. The final language was carefully drawn to be as broad and open-ended as possible. The convention specifically avoided designating the

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<sup>38</sup>Footnote 58 in original. *Proceedings*, p. 2670.

organizational location of the agency. While at various times references were made to it being a state department,<sup>[39]</sup> this question was left to legislative determination.

The convention also did not stipulate the functions of the agency, but the record is replete with references to the types of activities that might properly fall within its scope:

- help the people and local officials in various parts of the state obtain by their own efforts the kind of local self-government they need and can afford;<sup>[40]</sup>
- assist in establishing and organizing local government and in changing of classifications;<sup>[41]</sup>
- provide assistance and advice to cities, boroughs, service areas, etc.;<sup>[42]</sup>
- provide assistance in home rule charter drafting to boroughs and cities;<sup>[43]</sup>
- provide assistance and overview with respect to local debt and obligations, particularly since no debt ceiling was established in the constitution;<sup>[44]</sup>
- provide assistance and advice to unorganized boroughs, other unorganized areas, and small communities;<sup>[45]</sup>
- represent the state in local government affairs; provide coordination between state and local government; and assist in reconciling conflicts between local home rule and state control;<sup>[46]</sup>

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<sup>39</sup>Footnote 59 in original. *Minutes*, 12<sup>th</sup>, 18<sup>th</sup>, 19<sup>th</sup> Meetings.

<sup>40</sup>Footnote 60 in original. *Commentary*, p. 3. [Note: “Commentary” refers to *Commentary on Local Government Article*, Committee on Local Government at Alaska’s Constitutional Convention (January 16, 1956).]

<sup>41</sup>Footnote 61 in original. *Proceedings*, pp. 2670, 2758.

<sup>42</sup>Footnote 62 in original. *Proceedings*, p. 2758; *Minutes*, 9<sup>th</sup> Meeting.

<sup>43</sup>Footnote 63 in original. *Minutes*, 12<sup>th</sup> Meeting; *Proceedings*, pp. 2671-73; 3614-15.

<sup>44</sup>Footnote 64 in original. *Proceedings*, pp. 2757-58.

<sup>45</sup>Footnote 65 in original. *Proceedings*, p. 3621; *Minutes*, 23<sup>rd</sup> Meeting.

<sup>46</sup>Footnote 66 in original. *Proceedings*, p. 2757; *Minutes*, 16<sup>th</sup> Meeting.

- collect and supply data that would help the local boundary commission in the formulation of boundaries;<sup>[47]</sup>
- collect and publish information relating to local government;<sup>[48]</sup>  
and
- carry on continuing studies to assist the people and the legislature in determining what changes may be necessary from time to time in the interests of better local government.<sup>[49]</sup>

While suggesting several kinds of activities for the local government agency, the constitutional record is totally silent about the manner in which it was to discharge its responsibilities. The same is true generally of the agency's relationship to local government units. Several references are made to state services being provided along local unit (i.e., borough) lines,<sup>[50]</sup> but there is no explanation of the purpose of this intent nor of the manner in which it is to be accomplished. The convention assumed that the purpose of such an agency were sufficiently self-evident.

*Borough Government in Alaska*, pp. 53 – 55.

Of the six boards, commissions, and agencies mandated by Alaska's Constitution, two deal with the judicial branch, one deals with the legislative branch, one deals with the University of Alaska, and the remaining two - the LBC and the local government agency - deal with city and borough governments. The constitutional standing granted to the LBC and the local government agency reflects the framers' strong conviction that successful implementation of the local government principles laid out in the constitution was dependent, in large part, upon those two entities.

The framers recognized that deviation from the constitutional framework for local government would have significant detrimental impacts upon the constitutional policy of maximum local self-government. Further, they recognized that the failure to properly implement the constitutional principles would result in disorder and inefficiency in terms of local service delivery.

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<sup>47</sup>Footnote 67 in original. *Minutes*, 24<sup>th</sup> Meeting.

<sup>48</sup>Footnote 68 in original. *Proceedings*, p. 2757; *Committee Proposal/6a/Enrolled*.

<sup>49</sup>Footnote 69 in original. *Commentary*, p. 3.

<sup>50</sup>Footnote 70 in original. For example, *Minutes*, 9<sup>th</sup> Meeting.

### **Subsection 2. DCED Serves as Staff to the LBC.**

The duty to serve as the constitutional local government agency is presently delegated to DCED.<sup>51</sup> Within DCED, the Division of Community Advocacy (DCA) carries out the duty to advise and assist local governments. DCED also serves as staff to the LBC pursuant to AS 44.47.050(a)(2). The DCA Municipal Policy and Research Section carry out DCED's duties as LBC Staff.

DCED is required by 3 AAC 110.530 to investigate each municipal boundary proposal and to make recommendations regarding such to the LBC. As previously noted, LBC decisions must have a reasonable basis (i.e., a proper interpretation of the applicable legal standards and a rational application of those standards to the evidence in the proceeding). In recognition of such, DCED adopts the same viewpoint for itself in developing recommendations regarding matters pending before the LBC. That is, DCED is committed to developing its recommendations to the LBC based on what it deems to be the proper interpretation of the applicable legal standards and a rational application of those standards to the evidence in the proceeding. DCED takes the view that due process is best served by providing the Commission with a thorough, credible, and objective analysis of every municipal boundary proposal.

DCED's recommendations to the LBC are not binding on the LBC. As noted previously, the LBC is an autonomous commission. While the Commission is not obligated to follow DCED's recommendations, it has, nonetheless, historically considered DCED's analyses and recommendations to be critical components of the evidence in municipal boundary proceedings. Of course, the LBC considers the entire record when it renders a decision.

DCED staff also deliver technical assistance to municipalities, residents subject to impacts from existing or potential petitions for creation or alteration of municipal governments, petitioners, respondents, agencies, and others.

Types of assistance provided by DCED staff include:

- conducting feasibility and policy analysis of proposals for incorporation or alteration of municipalities;
- responding to legislative and other governmental inquiries relating to issues on municipal government;

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<sup>51</sup>AS 44.33.020 provides that DCED "shall (1) advise and assist local governments." The constitutional duties were originally established in the Division of Local Affairs. The name was later changed to the Local Affairs Agency in the Office of the Governor. In 1972, a separate department, the Department of Community and Regional Affairs (DCRA), was created to carry out the constitutional mandate. In 1999, DCRA was consolidated with the Department of Commerce and Economic Development as the Department of Community and Economic Development (DCED). On September 2, 2004, DCED will be renamed as the Department of Commerce, Community, and Economic Development (DCCED).

- conducting informational meetings;
- providing support during Commission hearings and other meetings;
- drafting decisional statements;
- implementing decisions of the Commission;
- certifying municipal boundary changes;
- maintaining incorporation and boundary records for each of Alaska's 162 municipal governments;
- drafting reports, correspondence, public notices, legislation, or regulations as requested by the Commission;
- coordinating, scheduling, and overseeing public meetings and hearings for the Commission;
- developing orientation materials and providing training for new Commission members;
- maintaining and preserving Commission records in accordance with the public records laws of the State;
- developing and updating forms and related materials for use in municipal incorporation or alteration; and
- if directed by the Commission, acting as a petitioner on a matter that the Commission believes will promote local government standards in the Alaska Constitution, AS 29.04, AS 29.05, or AS 29.06.

Given other DCED work assignments, there are less than two full-time equivalent positions currently assigned to work on Commission matters.

### ***Section C. Fundamental Relationship Between an Organized Borough and a City Government.***

#### **Subsection 1. Constitutional Provisions Regarding Cities and Boroughs.**

This remand proceeding involves what amounts to a conflict over whether a 4.58 square-mile territory is best served exclusively by the Kenai Peninsula Borough or by the Borough in concert with the City of Homer. Resolution of that conflict necessitates consideration of the constitutional framework for local government, with focus on those aspects dealing with the interrelationship between an organized borough and a city government within that borough.

The framers of Alaska's Constitution took advantage of the opportunity to carefully study the governmental systems of the then existing 48 states – and in some cases, systems of other countries – in an effort to design an ideal model.<sup>52</sup> Because the structure of local government under the Territory of Alaska was so rudimentary, those charged with designing the future structure for local government in Alaska had exceptional freedom.

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<sup>52</sup> See, *Alaska's Constitutional Convention*, pp. 12-13, 18-21, 40-41, and 116-117.

Constitutional Convention Delegate Victor Fischer described those circumstances as follows:

Under territorial status, local institutions had undergone only limited development; there was little self-determination at the territorial and even less at the local level. Federal law prescribed the powers of the territorial legislature, severely limiting the scope and types of local government and restricting the powers that could be exercised by cities. For example, counties could not be established, bonding criteria were strictly delimited, and home rule could not be extended to cities.

### **A New Local Government System**

Study of the PAS staff paper<sup>[53]</sup> and a review of local government experiences throughout the United States, Canada, Scandinavia, Latin America, and other parts of the world convinced committee members that they could look outside Alaska primarily for the purpose of evaluating basic principles and determining what *not* to do. They quickly saw that modern times and Alaska's unique geographic characteristics demanded a totally new and different system from any existing elsewhere. Delegates did not want to saddle Alaska with the conventional jumble of local government jurisdictions, particularly the proliferating special districts and archaic counties. Only an infinitesimal part of Alaska's 586,400 square miles was organized (about thirty cities and fifteen special districts); the bulk of the territory had no local government whatsoever. Thus, delegates faced a situation which invited, almost demanded, innovation. Accordingly, the convention's local government committee, aided by several consultants, proceeded to design a local government system adapted to Alaska and the times.<sup>[54]</sup>

*Alaska's Constitutional Convention*, pp. 116-117.

In its efforts to fashion an ideal structure, the Committee on Local Government was particularly interested in minimizing intergovernmental conflict, including conflict stemming from annexation. The 1971 ISEGR study notes:

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<sup>53</sup>Footnote 87 in original. Public Administration Service, *Constitutional Studies*, Chapter VIII.

<sup>54</sup>Footnote 88 in original. Principal consultants were Weldon Cooper and John Bebout. Primary references included the PAS staff study and George W. Rogers' *A Handbook on Alaska Regionalism*, Office of the Governor, Juneau, Alaska, November 21, 1955 (mimeo). The seven members brought to the committee a variety of backgrounds and experiences: large-city and small-town mayors, city councilmen, municipal utility board membership, secretary of League of Alaska Cities; they included businessmen, a civil engineer, a professional city planner, a commercial fisherman, a bush pilot, and a minister. Significantly, there were no attorneys, and no member represented the special interest of education.

While designing an ideal model, delegates were not unaware of the potential for local government conflict. Indeed, the Alaska local political scene at the time was highlighted by disagreements between cities and school districts, battles over annexation, and troubles between cities and public utility districts.<sup>[55]</sup> Delegates were also aware of interjurisdictional problems existing among cities, counties, and special districts in the larger urban areas of other states. They thus sought to create a system in which conflict would be minimized. As stated by the committee:

The borough is created as a form of area government. Many boroughs of Alaska will have no cities within them. Others might include one or more cities, which would be part of the borough.

The borough would have no control over internal affairs of cities within its boundaries. The borough's jurisdiction would cover matters involving the borough outside of cities and matters jointly involving the city and a surrounding area.

The committee believes that maximum cooperation between boroughs and cities and integration of their mutual functions will provide residents with best services at least cost. Provisions in this article facilitating mutual action include authority for cooperative agreements, for the transfer of functions from one unit to another and for establishment of service areas. Coordination will also be fostered by the provision that the city's representatives on the borough governing body be members of the city council since they know what the city can offer and are familiar with city needs.<sup>[56]</sup>

The intended relationship was probably best described in the following words:

Our whole concept has been based, not upon a separation of the two basic units of government, the borough and the city, but as close an integration of functions between the two as is possible. It was felt, for instance, that we should not, definitely not follow the pattern that you find in most stateside counties where you have the exactly same functions being carried out separately at these two levels of government with their own hierarchy of officialdom and separate capital investment. It was our thought that wherever functions overlap that they should be integrated, and from that standpoint it was the Committee's feeling that if we can get the coordination between the city council and the borough assembly we would be able to achieve the maximum amount of cooperation because then each would best know what the other had to offer, they would realize what the problems of the other were, and you would force them,

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<sup>55</sup>Footnote 28 in original. See *Minutes*, 12<sup>th</sup>, 35<sup>th</sup> and 40<sup>th</sup> Meetings, *Proceedings*, pp. 2637-38.

<sup>56</sup>Footnote 29 in original. *General Discussion*, pp.4-5; also see *Proceedings*, pp. 2626; 2653-54.

almost, into the cooperation that we hope to achieve in our local government.<sup>[57]</sup>

*Borough Government in Alaska*, pp. 43 - 44.

Many of the fifteen sections of the Local Government Article of Alaska's Constitution deal in an important fashion, directly or indirectly, with city-borough relationships. In terms of this remand proceeding, however, some of those elements of the Local Government Article are clearly more relevant and significant than others. Emphasis is placed here on the constitutional provisions that relate most directly to the issue on remand.<sup>58</sup>

The first provision of the Local Government Article addressing city-borough relations is set out in the opening provision of Article X. It reflects the constitutional framers desire to avoid a flaw in the traditional county form of government – duplication of local taxing jurisdictions. The framers also had a strong desire to promote efficient delivery of municipal services. Those goals are clearly stated in Article X, Section 1 of the Constitution.

**Article X, Section 1. Purpose and Construction.** The purpose of this article is to provide for maximum local self-government with a minimum of local government units, and to prevent duplication of tax-levying jurisdictions. A liberal construction shall be given to the powers of local government units.”

In developing the framework of local government in Alaska, constitutional convention delegates debated a proposal mandating conversion of city governments into borough service areas. It is particularly noteworthy in the context of this remand proceeding that the framers rejected that course of action. It is also significant that the delegates considered and approved other options to reduce intergovernmental conflict, specifically including provisions allowing for the expansion of the jurisdictional boundaries of city governments to encompass growth and development beyond their boundaries. The 1971 ISEGR study describes the deliberations of the delegates regarding these matters as follows:

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<sup>57</sup>Footnote 30 in original. *Proceedings*, p. 2625.

<sup>58</sup>Provisions dealing with city-borough relationships in Article X not addressed in detail here include Sections 4 and 13. Originally, Section 4 provided for joint city council-borough assembly membership. Intended to promote harmony and intergovernmental coordination, it had the opposite effect. See *Alaska State Government and Politics*, Gerald A. McBeath and Thomas A. Morehouse, eds., 1987, p. 49. Additionally, the requirement originally found in Section 4 that at least one member of the council of every first-class city serve on the assembly was impractical in terms of the equal representation provisions of the Alaska and U.S. constitutions. The joint membership provision was repealed in 1972 (the only amendment to the Local Government Article). Section 13 authorizes agreements for cooperative and joint administration of functions and powers, and permits the transfer by a city of any of its powers or functions to the borough in which it is located.

Given the general direction and character of their thinking on boroughs, the Local Government Committee was faced with the question of what to do about existing and future cities. Consideration was given to the possibility of doing away with cities altogether, even though they were the only units of general local government then existing in Alaska.

Abolition of cities and their reconstitution as urban service areas under the borough was considered as one way of promoting joint use of facilities and services and avoiding duplication of taxing jurisdictions. But other ways of achieving these objectives were also considered: extension of city boundaries to cover entire urban areas, and eventual unification or consolidation of borough and city governments. It was also recognized that cities had over the years developed distinct corporate identities and a substantial array of facilities and services; any sudden change from municipal status to uncertainty under the borough was not likely to be acceptable to city residents.<sup>[59]</sup>

It was decided that the status of cities should not be changed directly by the constitution; they would continue to exist. It was stipulated, however, that the city be a "part" of the borough in which it was located, and other provisions were made with the intent of encouraging cooperation between cities and boroughs. These included joint service of city councilmen on the legislative bodies of both the city and the borough, joint performance of functions, and voluntary transfer of functions from the city to the borough.

*Borough Government in Alaska*, p. 43.

The Alaska Supreme Court characterized the decision to allow city governments to continue to exist as a practical compromise. The Court stressed, however, that the framers intended that city and borough governments cooperate.

In an attempt to simplify local government and prevent the overlapping of governmental functions, the framers of the constitution (and, in particular, the Committee on Local Government) considered establishing a single unit of local government with the abolition of cities altogether.<sup>[60]</sup> Although the committee felt that a completely unified local government structure had very definite advantages, it was also considered a concept whose time had not yet come. Section 2 of Article X presents the compromise solution: "All local government powers shall be vested in boroughs and cities. The state may delegate taxing powers to organized boroughs and cities only." However, these two units of government were

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<sup>59</sup>Footnote 27 in original. *Minutes*, 14<sup>th</sup>, 15<sup>th</sup>, and 19<sup>th</sup> Meetings.

<sup>60</sup>Footnote 6 in original. See V. Fischer, *Alaska's Constitutional Convention* at 121 (1975).

not to be disparate and competing, but were intended to cooperate and collaborate.<sup>[61]</sup>

*City of Homer v. Gangl*, 650 P.2d 396, 400 (Alaska 1982).

At the core of the intergovernmental conflict in this matter are provisions found in Article X, Section 5 of Alaska's Constitution dealing with establishment of organized borough service areas. Section 5 states:

Service areas to provide special services within an organized borough may be established, altered, or abolished by the assembly, subject to the provisions of law or charter. A new service area shall not be established if, consistent with the purposes of this article, the new service can be provided by an existing service area, by incorporation as a city, or by annexation to a city. The assembly may authorize the levying of taxes, charges, or assessments within a service area to finance the special services.

The Alaska Supreme Court addressed the nature of a borough service area in a 1993 case involving consolidation of road service areas in the KPB. The Court noted that service areas of organized boroughs have neither corporate status nor the right to sue and be sued. The Court correctly characterized service areas simply as defined geographical areas in which a borough provides higher or different levels of service compared to those provided generally by the borough on an areawide or nonareawide basis. Specifically, the Court stated:

As a general rule, only independent legal entities may sue or be sued. See *Walter v. Butkovich*, 584 F.Supp. 909, 925 (M.D.N.C.1984); *Meyer v. City and County of Honolulu*, 729 P.2d 388, 390 n. 1 (Hawaii App. 1986) *aff'd in part, reversed in part*, 69 Haw. 8, 731 P.2d 149 (1986). Alaska law specifically gives cities and boroughs corporate status, and

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<sup>61</sup>Footnote 7 in original. A member of the Committee on Local Government offered the following explanation to the convention delegates:

Our whole concept has been based, not upon a separation of the two basic units of government, the borough and the city, but as close an integration of functions between the two as is possible. It was felt, for instance, that we should not, definitely not follow the pattern that you find in most stateside counties where you have the exactly same functions being carried out separately at these two levels of government with their own hierarchy of officialdom and separate capital investment. It was our thought that wherever functions overlap that they should be integrated, and from that standpoint it was the Committee's feeling that if we can get the coordination between the city council and the borough assembly we would be able to achieve the maximum amount of cooperation because then each would best know what the other had to offer, they would realize what the problems of the other were, and you would force them, almost, into the cooperation that we hope to achieve in our local government.

4 Proceedings of the Alaska Constitutional Convention 2625 (January, 1956).

the right to sue and be sued. AS 09.65.070 – .080, AS 29.04.010 –.020, AS 29.35.010(14). There are no similar provisions for service areas.

A service area is a specific geographical area within which a municipal service is furnished by a borough. Its powers derive from statute, charter and ordinance. Service areas have no corporate status or right to sue under any Alaska statute. . .

*North Kenai Peninsula Road Maintenance Service Area v. Kenai Peninsula Borough*, 850 P.2d 636, 639 (Alaska 1993).

The 1971 ISEGR study describes the deliberations of the constitutional framers regarding organized borough service areas. It is particularly noteworthy in this remand proceeding that the framers wanted to avoid proliferation of service areas that dealt with a single or minimal numbers of services where the territory in question had broad needs. Consequently, the delegates expressly favored city jurisdiction (accomplished either through city incorporation or city annexation) over establishment of a new borough service area.

The 1971 ISEGR study notes:

While intent on minimizing the number of local jurisdictions, the Local Government Committee believed that need might arise to provide special services to localized areas within the borough. Accordingly, the constitution authorizes establishment of service areas by the assembly of an organized borough.<sup>[62]</sup>

Initially, the service area was conceived as a means of providing services within a limited part of the borough in which taxes, assessments, and charges could be levied to cover the cost of such services. The concept was subsequently expanded to include areawide services that might be administered by a special instrumentality such as a health or school district. Among services mentioned for possible provision to a service area were road improvements, fire protection, education, health, public utilities, garbage collection, and others.<sup>[63]</sup>

Jurisdiction over service areas of organized boroughs was to be vested in the assembly, primarily to assure a unified overview of all functions and to place the power of taxation under a single areawide authority.<sup>[64]</sup> Overlapping of service areas would be possible, but the delegates

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<sup>62</sup>Footnote 20 in original. The legislature may provide for the establishment of service areas in unorganized boroughs, since under Article X, Section 6, the legislature may exercise within unorganized boroughs all the powers that the assembly has within an organized borough. (*Proceedings*, pp. 2717-28.)

<sup>63</sup>Footnote 21 in original. *General Discussion*, pp. 5-6; *Proceedings*, pp. 3609-11.

<sup>64</sup>Footnote 22 in original. *General Discussion*, p. 5; *Proceedings*, p. 2707.

desired to keep this to a minimum. Section 5 of the local government article states that the assembly “may authorize the levying of taxes . . . with in a service area . . .,” but the delegation of taxing authority to service areas was discussed both in committee and by the convention and would appear to fall within the range of constitutional intent.<sup>[65]</sup> Establishment of advisory or administrative boards for service areas was to be the prerogative of the borough assembly.<sup>[66]</sup> Thus, while overlapping and delegation might occur, all service areas would remain under the jurisdiction of the assembly.

The stated purpose of preventing duplication of tax levying jurisdictions and providing for a minimum of local government units was directly responsible for the constitutional provision that “A new service area shall not be established if . . . the new service can be provided by an existing service area, by incorporation as a city, or by annexation to a city.”<sup>[67]</sup> The committee’s objective was to avoid having “a lot of separate little districts set up . . . handling only one problem . . .”; instead, services were to be provided wherever possible by other jurisdictions capable of doing so.<sup>[68]</sup>

Moreover, an amendment to eliminate the preference given to city annexation or city incorporation over establishment of new service areas was defeated by the convention.

*Borough Government in Alaska*, pp. 41-43.

In sum, those that wrote Alaska’s Constitution rejected a mandate for reconstitution of cities as borough service areas. Instead, they not only allowed for city annexation, they also expressly favored such over establishment of a new borough service area.

The constitutional predisposition for city annexation or incorporation over establishment of a new borough service area is repeated in the Alaska Statutes. AS 29.35.450(b) states:

A new service area may not be established if, consistent with the purposes of Alaska Const., art. X, the new service can be provided by an existing service area, by annexation to a city, or by incorporation as a city.

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<sup>65</sup>Footnote 23 in original. *Minutes*, 36th Meeting; *Proceedings*, pp. 2707, 3613.

<sup>66</sup>Footnote 24 in original. *General Discussion*, pp. 5-6; *Minutes*, 26th Meeting.

<sup>67</sup>Footnote 25 in original. *Constitution*, Article X, Section 5.

<sup>68</sup>Footnote 26 in original. *Proceedings*, p. 2715.



## CHAPTER 2 - PAST, ONGOING, AND FUTURE PROCEEDINGS.

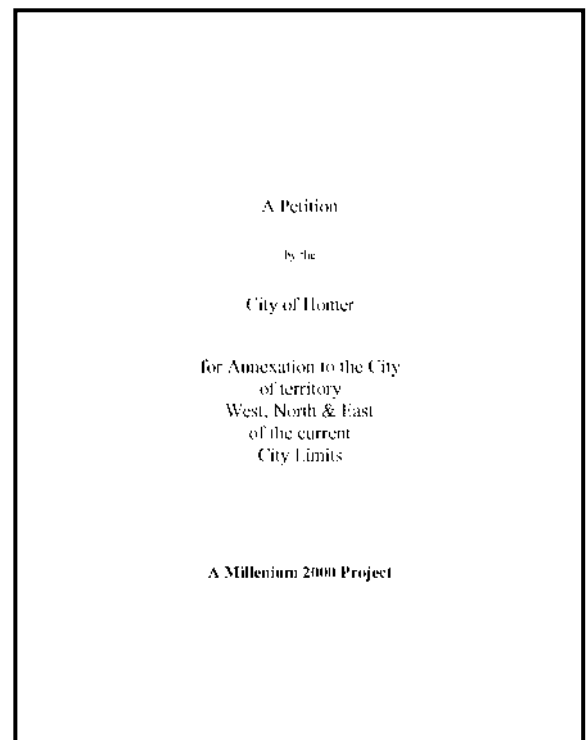
This chapter presents information about the proceedings relating to the 4.58 square-mile annexation to the City and this pending remand. Details are provided regarding the actions relating to the review of the original annexation proposal by the Commission and the subsequent examination by the 2002 Alaska State Legislature of the Commission's amended annexation proposal. Also included is information regarding the review of the boundary change in terms of the Federal Voting Rights Act by the U.S. Justice Department, formal implementation of the annexation, and appeals to the Superior Court. This chapter concludes with details about past, ongoing and future proceedings regarding the remand proceeding.

### ***Section A. Commission Review of March 2000 Annexation Proposal.***

#### **Subsection 1. Petition Filed.**

On March 20, 2000, the City petitioned the LBC for annexation of an estimated 25.64 square miles under the legislative-review method authorized by Article X, § 12 of the Constitution of the State of Alaska, AS 29.06.040(b), and AS 44.33.812(b)(2). Following a technical review of the form and content of the Petition, DCED accepted it for filing on March 29, 2000.

The Petition, along with a five-page memorandum correcting errors in the Petition remains available for review online at <<http://www.commerce.state.ak.us/dca/lbc/homer.htm>> ("Homer Annexation Web site").



#### **Subsection 2. Public Notice of the Filing of the Petition and Service of the Petition.**

Public notice of the filing of the Petition was provided as required by law. The notice was:

- published multiple times as a display ad in the *Homer News*;
- posted in electronic format on the State of Alaska's Web site *Online Public Notice* system;
- posted in electronic format on the LBC Internet Web site maintained by DCED;
- posted in printed format at multiple sites within the territory proposed for annexation;

- posted in printed format at multiple sites within the existing boundaries of the City;
- posted at the Kachemak City Hall; and
- mailed to several individuals and entities.

A copy of the Petition, including all exhibits, was made available for public review at the Homer City Hall and Homer Public Library.

The Notice of Filing continues to be available for review at the Homer Annexation Web site.

### **Subsection 3. Public Informational Meetings.**

On April 17, April 18, and May 2, 2000, DCED staff attended meetings with various groups in Homer regarding annexation.

### **Subsection 4. Responsive Briefs and Written Comments.**

Fourteen responsive briefs, collectively comprising 751 pages (including exhibits), were filed with DCED by June 5, 2000, the deadline for such established by the Commission Chair. The 14 individuals and organizations that filed responsive briefs are listed in the glossary under “respondents.”

In addition to the 14 responsive briefs, a total of 168 timely letters concerning the proposed annexation were received by DCED. Most of the letters expressed opposition to the proposed annexation, three letters expressed support for the proposed change, and others raised issues but did not support or oppose the entire annexation proposal per se. The 168 individuals and organizations that submitted timely letters are named in the glossary under “Annexation Correspondents.”

The responsive briefs and letters are available for review at the Homer Annexation Web site.

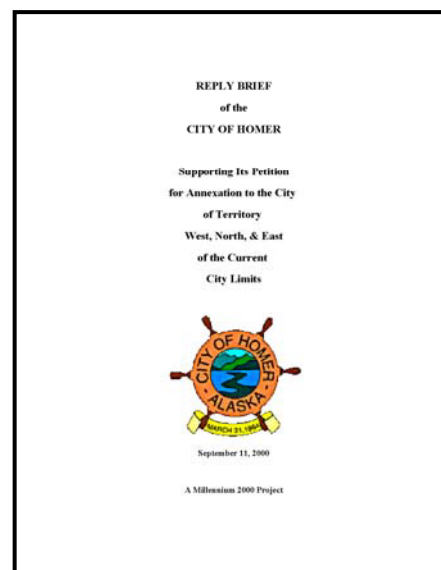
### **Subsection 5. Additional Public Informational Meetings.**

On June 14 and August 24, 2000, DCED staff attended additional meetings in Homer regarding annexation.

### **Subsection 6. City Reply Brief.**

On September 11, 2000, the City filed its Reply Brief in response to the 14 Responsive Briefs and the 168 written comments.

The City’s Reply Brief is available for review at the Homer Annexation Web site.



### **Subsection 7. Additional Public Informational Meetings.**

On July 31, 2001, DCED staff conducted two public informational meetings in Homer in accordance with 3 AAC 110.520. Additionally, on July 31, DCED staff was available to the public to address questions from noon to 10 p.m.



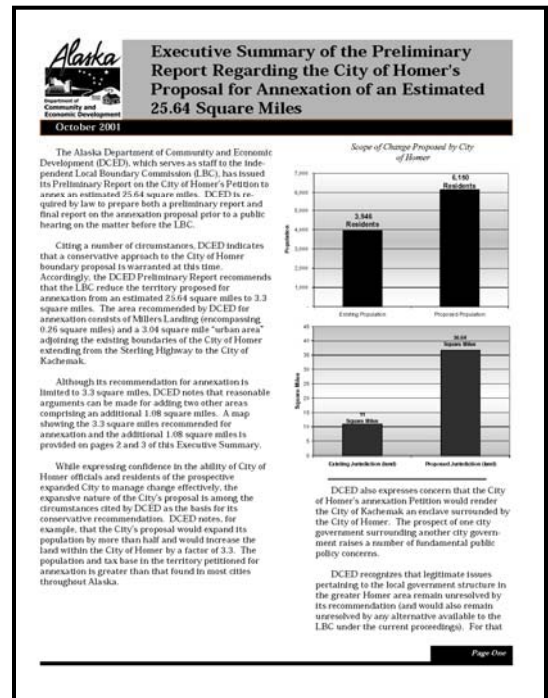
Forty-seven people attended the first public informational meeting on July 31, which began at 2 p.m. Nineteen people attended the second meeting, which began at 7 p.m. During both meetings, an opportunity was provided for the public to comment or ask questions about developments relating to the Petition that had occurred since the filing of the City's Reply Brief in September 2000. Most of those offering comments expressed opposition to all, or specific elements of, the proposed annexation.

### **Subsection 8. DCED Annexation Preliminary Report.**

In October 2001, DCED completed its 412-page Annexation Preliminary Report. The Annexation Preliminary Report recommended that the Petition be amended to reduce the size of the territory from 25.64 square miles to approximately 3.3 square miles. The Annexation Preliminary Report is still available for review at the Homer Annexation Web site.

On October 5, 2001, DCED distributed copies of its four-page *Executive Summary of the Preliminary Report Regarding the City of Homer's Proposal for Annexation of an Estimated 25.64 Square Miles* ("Annexation Executive Summary"). The Annexation Executive Summary was provided to thirty-one interested individuals and organizations including the Petitioner, respondents, LBC members, then-State Representative Drew Scalzi, then-State Senator John Torgerson, the City of Kachemak, and news media serving the greater Homer territory.

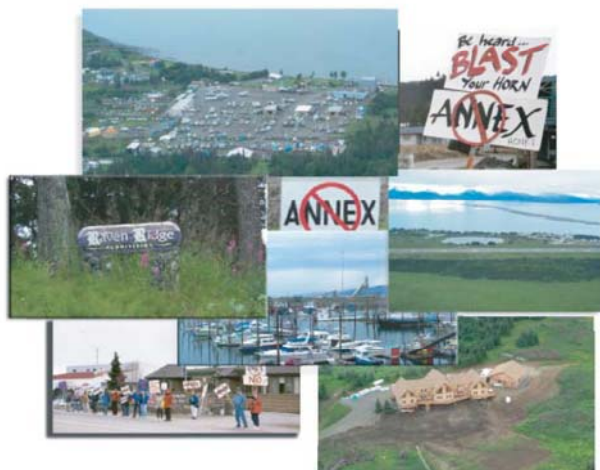
In addition, those same individuals and organizations were provided a compact disc containing the Annexation Executive Summary and DCED's complete 412-page Annexation Preliminary Report. The Homer City Clerk and the Director of the Homer Public Library were each provided ten copies of the CD for use by the public. DCED also posted a copy of the Annexation Executive Summary on the Internet on October 5, 2001.



On October 6, 2001, a printed copy of the 412-page Annexation Preliminary Report was mailed to the same individuals and organizations to which the Annexation Executive Summary had been mailed the previous day.

On October 8, 2001, DCED mailed an additional 138 copies of the Annexation Executive Summary to interested individuals and organizations. On October 9, 2001, DCED distributed 76 printed copies of the Annexation Preliminary Report to 12 individuals and organizations. The October 9, 2001, mailing included 60 copies of the Annexation Preliminary Report and 6 additional copies of the CD-ROM sent to the Homer City Clerk for distribution to the Library and City officials.

**Preliminary Report Regarding the  
City of Homer's Proposal for  
Annexation of an Estimated  
25.64 Square Miles**



Deborah B. Sedwick  
Commissioner

Tony Knowles  
Governor



On October 9, 2001, the Director of the Homer Public Library made available to the public the printed copy of the Annexation Preliminary Report mailed by DCED on October 6. Also on October 9, the Library Director made available to the public 10 CD-ROM copies of the Annexation Preliminary Report, and 15 copies of the Annexation Executive Summary. On October 22, 2001, the Homer Library made 25 additional copies of the printed Annexation Preliminary Report available to the public.

Between October 5 and October 26, 2001, DCED received requests from the public for five additional copies of the Annexation Preliminary Report. DCED promptly fulfilled each request.

Because of the extensive size of the Annexation Preliminary Report, it was necessary to post the DCED Annexation Preliminary Report on the Internet in increments. DCED staff posted segments of the Annexation Preliminary Report on October 10, 19, and 25, 2001.


In total, DCED distributed 268 printed Annexation Executive Summaries, 56 CDs containing the Annexation Preliminary Report, and 126 printed copies of the Annexation Preliminary Report.

The LBC Chair set November 6, 2001, as the deadline for comment on DCED's Annexation Preliminary Report. Comments expressing a wide range of views were received from 32 individuals and organizations. The comments were made available for

public review at the Homer City Clerk's office and the Homer City Library on November 8, 2001.

### **Subsection 9. Scheduling and Notice of Public Hearing.**

The Commission scheduled a public hearing on the annexation proposal to begin December 14, 2001. DCED arranged for notice of the hearing to be published in the *Homer News* on November 8, November 22, and December 6, 2001, and in the *Homer Tribune* on November 14, November 28, and December 12, 2001. In addition, DCED arranged for public notice of the hearing to be posted electronically on the State of Alaska *Online Public Notice* system beginning November 5, 2001, and continuing through the date of the hearing.



**Members**


*Kevin Waring*  
Chairperson  
At-Large

*Kathleen Wasserman*  
Vice-Chairperson  
First Judicial District

*Member*  
Second Judicial District

*Allan Tesche*  
Member  
Third Judicial District

*Andith Lynch*  
Member  
Fourth Judicial District



**State of Alaska**  
**Local Boundary Commission**

**NOTICE OF MEETINGS AND PUBLIC HEARING  
REGARDING CITY OF HOMER ANNEXATION  
PROPOSAL**

At 11:00 a.m., December 13, 2001 (time, weather, and other circumstances permitting) the Local Boundary Commission (LBC) will assemble at the offices of Maritime Helicopters, 3520 FAA Road, Homer, Alaska to begin a tour by air of the estimated 25.64 square miles proposed for annexation to the City of Homer. Following the helicopter tour, the LBC will tour the territory by automobile.

The next morning, the LBC will convene a public hearing on the annexation proposal as follows:

**Friday, December 14, 2001 – 9:00 a.m.**  
**Mariner Theater – Homer High School**  
**600 East Fairview Avenue, Homer, Alaska**

If, as anticipated, the hearing and deliberations continue past December 14, the Commission will reconvene the proceedings on Saturday, December 15, 2001 at 9:00 a.m. at the Mariner Theater. If the proceedings have not concluded by 3:00 p.m., December 15, 2001, the Commission will reconvene at the Homer City Council Chambers, 491 East Pioneer Avenue, later that day or the following day at a time to be publicly announced by the Commission.

The hearing will be conducted in accordance with 3 AAC 110.560. Following the hearing, the LBC may convene a decisional session regarding the annexation proposal in accordance with 3 AAC 110.570. Copies of 3 AAC 110.560, 3 AAC 110.570, the proposed agenda, and guidelines for comments at the hearing are available at the City of Homer Public Library and the office of the Homer City Clerk. Those materials are also available for review on the Internet at:

<http://www.dced.state.ak.us/mra/LBC/lbcactivities.htm>

Individuals with disabilities who need reasonable accommodations to participate at the hearing should contact LBC staff at (907) 269-4559 by December 7, 2001. Questions regarding this matter may be directed to:

**LBC Staff**  
Department of Community and Economic Development  
550 West 7th Avenue, Suite 1770  
Anchorage, Alaska, 99501-3510  
Telephone: (907) 269-4559  
Fax: (907) 269-4539  
e-mail: [Dan\\_Bockhorst@dced.state.ak.us](mailto:Dan_Bockhorst@dced.state.ak.us)

The notice, draft agenda, statutes and regulations governing hearing and decisional procedures, and guidelines for comments at the hearing were mailed to the Petitioner, respondents, LBC members, then-Representative Drew Scalzi, then-Senator John Torgerson, City of Kachemak, and Homer news media on November 5, 2001. Those materials remain available for review at the Homer Annexation Web site.

On November 5, 2001, a request for public service broadcast announcements of the hearing was sent to KBBI-AM, the Homer affiliate of the Alaska Public Radio Network. Also on November 5, the City posted the notice of the hearing at nine locations in the territory proposed for annexation and within the boundaries of the City.

The City also made available for public review at the office of the Homer City Clerk and the Homer Public Library the hearing notice, draft agenda, laws governing hearing procedures, laws governing decisional procedures, and guidelines for comments.

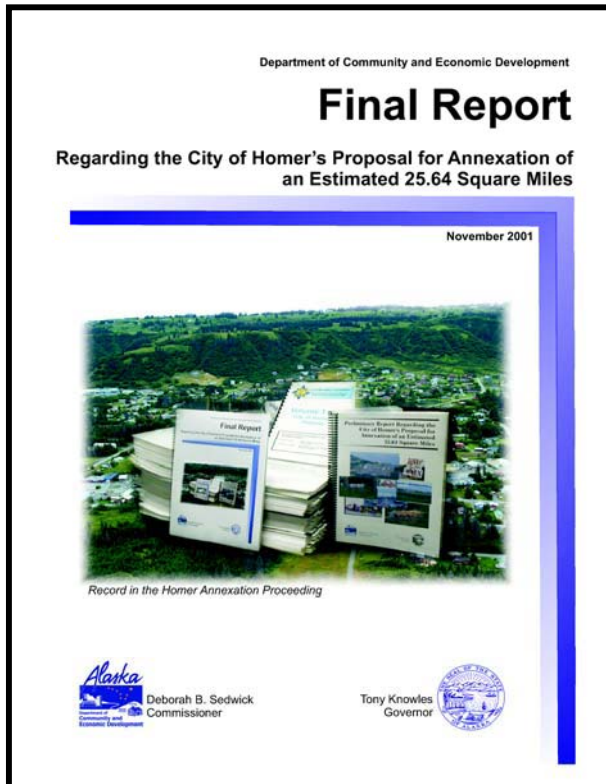
Notice of the Commission's December 2001 hearing in Homer, draft agenda, the laws governing hearing and decisional procedures, and guidelines for comments at the hearing were posted to the LBC Web site on November 6, 2001.

### **Subsection 10. DCED Final Report.**

On November 21, 2001, DCED released its *Final Report Regarding the City of Homer's Proposal for Annexation of an Estimated 25.64 Square Miles* ("Annexation Final Report" as distinguished from the Final Report to be prepared in this proceeding ("Remand Final Report"). The Annexation Final Report remains available for review on the Homer Annexation Web site.

The timely comments regarding DCED's Annexation Preliminary Report were synopsized in DCED's Annexation Final Report. In its Annexation Final Report, DCED expanded the size of the territory recommended for annexation from 3.3 square miles to approximately 3.9 square miles.

DCED distributed 119 copies of its Annexation Final Report on November 21, 2001. Sixty copies were provided to the City for distribution to staff and the public through the office of the Homer City Clerk and Homer Public Library. On that same date, DCED distributed an executive summary of the Annexation Final Report to 125 individuals and organizations.



### **Subsection 11. LBC Inspection of Territory and Hearing.**

On December 13, 2001, prior to its hearing on the matter, the four appointed members of the Commission toured the area by helicopter and automobile and inspected the 25.64 square miles proposed for annexation.

The Commission convened its public hearing on the City's annexation proposal on December 14, 2001 at the Mariner Theater in the Homer High School at approximately 9 a.m. The entire hearing was broadcast live on local radio station KBBI.



After introductory remarks by the Commission Chair, DCED summarized its reports and recommendations concerning the annexation proposal.

Following DCED's summary, Gordon Tans, Attorney for the City, made an opening statement on behalf of the Petitioner.

After the Petitioner's comments, opening statements were made by 11 of the 14 respondents.

The opening statements by respondents were followed by sworn testimony provided by five witnesses called by two respondents.

The City did not call witnesses to provide sworn responsive testimony.

Following the sworn testimony of witnesses called by the respondents, the hearing was opened for a period of comment by the general public. Public comment was received during that segment from 54 individuals.

At the conclusion of those comments, no one else from the general public came forward to offer comments. One of the respondents requested and was granted permission to give her closing statement at that time.

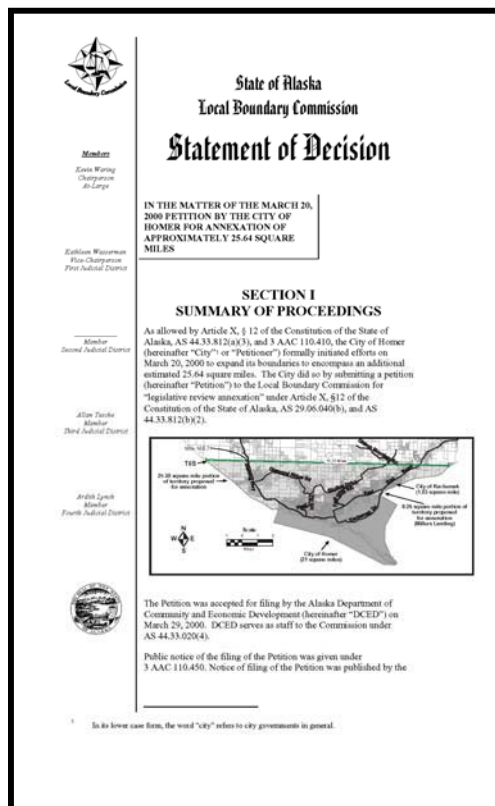
After the closing statement from that respondent, two other individuals from the general public came forward to offer comments.

The LBC Chair then recessed the hearing at approximately 8:20 p.m. The hearing reconvened at the Mariner Theater on Saturday, December 15, at approximately 9:15 a.m. Seven individuals from the general public came forward to offer comments.

Following those comments, the Petitioner presented its closing statement. City Attorney Gordon Tans made the statement on behalf of the City.

Closing statements from ten respondents followed the closing statement by the Petitioner.

The hearing concluded at approximately noon on December 15.



## **Subsection 12. LBC Decisional Session.**

Immediately following the hearing on December 15, 2001, the Commission convened a decisional session lasting approximately two hours. Guided by the 14 city annexation standards set out in State law, the Commission determined during the decisional session that it would be appropriate to limit the size of the annexation at that time to an estimated 4.58 square miles. Accordingly, the Commission amended the Petition to reduce the territory proposed for annexation from 25.64 square miles to an estimated 4.58 square miles.

### **Subsection 13. Adoption of Decisional Statement.**

On December 26, 2001, the Commission adopted a 42-page decisional statement setting out the basis for its decision to amend the Petition and approve the amended Petition. As noted previously, that decisional statement is included in this Remand Preliminary Report as Appendix A. The decisional statement is also available on the Homer Annexation Web site.

### **Subsection 14. Requests for Reconsideration.**

Timely requests for reconsideration of the Commission's December 26, 2001, decision to approve annexation of approximately 4.58 square miles to the City were filed by the following individuals and organizations in the order listed:

Citizens Concerned About Annexation (CCAA);  
Abigail Fuller;  
Alaskans Opposed to Annexation by Erwin and Erwin;  
Doris Cabana and "Alaskans Opposed Against Annexation";<sup>69</sup>  
Sallie Dodd Butters; and  
Pete Roberts.

Those requests for reconsideration remain available for review on the Homer Annexation Web site. On January 17, 2002, the Commission met to review the requests for reconsideration. During the meeting, the Commission rejected all six requests.

### **Subsection 15. Submission of Amended Proposal to the Legislature.**

The Commission submitted the amended annexation proposal to the Alaska Legislature in accordance with Article X, Section 12 of the Constitution on January 23, 2002. At that point, the Commission's jurisdiction over the matter passed to the Legislature.

## ***Section B. Legislative Review of the Amended Annexation Proposal.***

Under Alaska's Constitution, the Legislature had 45 days following the January 23, 2002, date of submission of the proposal (i.e., until March 9, 2002) to review it. If both houses of

the Legislature did not reject the proposal by adopting a joint resolution providing for such within that 45-day review period, the annexation would be allowed to proceed.



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<sup>69</sup>The request for reconsideration stated elsewhere that it was made by "Alaskans Opposed to Annexation"

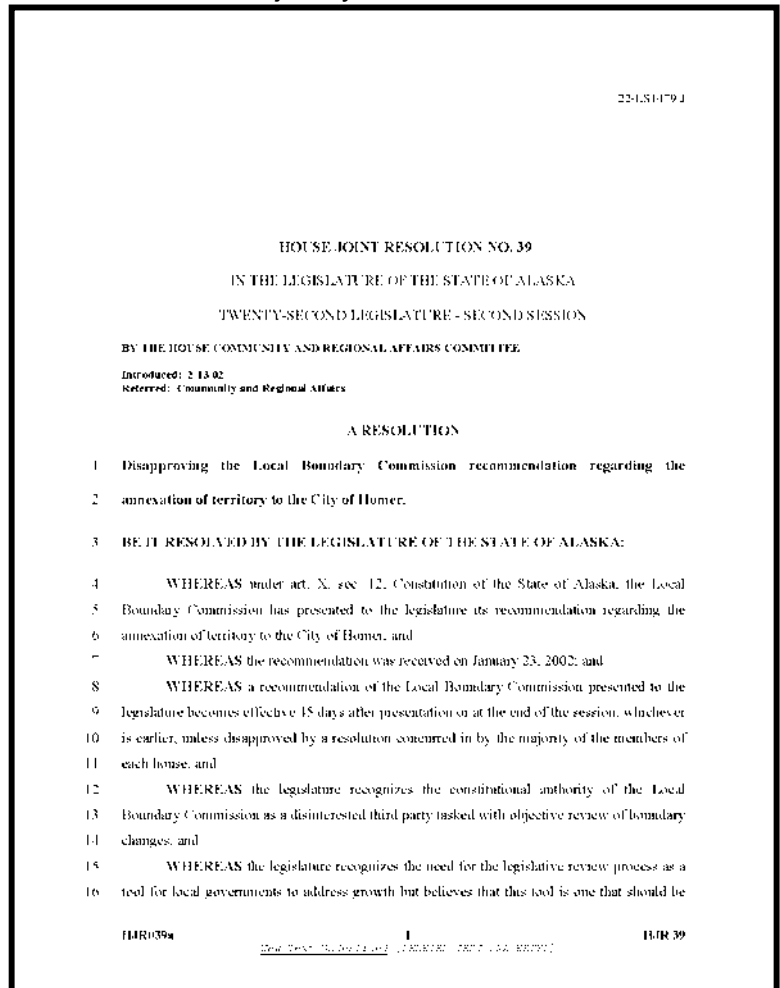
On February 7, 2002, the fifteenth day of the legislative review period, the House CRA Committee and the Senate CRA Committee met jointly to address the amended annexation proposal. The Senate CRA Committee Chair was the Senator representing the territory within the corporate boundaries of the City and the territory originally petitioned for annexation. The State House Representative from the House Election District encompassing both the territory within the City's boundaries and the territory petitioned for annexation was a member of the House CRA Committee.

The February 7, 2002, joint committee meeting lasted approximately two hours and forty-five minutes.<sup>70</sup> During the meeting, testimony was provided by the LBC, DCED, Director of the Legislative Legal and Research Division, Mayor and City Council members of the City, and the City Attorney.

On February 9, 2002, the House CRA Committee and Senate CRA Committee met again in joint session to address the amended annexation proposal. The meeting lasted three hours and twenty minutes. During the meeting, testimony was received from 66 residents of Homer, the amended territory proposed for annexation, and other territory nearby.

On February 12, 2002, the House CRA Committee and Senate CRA Committee met jointly for a third time to address the annexation proposal. Testimony was provided by the Senate CRA Committee Staff, the LBC Chair, and DCED. The meeting lasted approximately forty-five minutes.

On February 13, 2002, the twenty-first day of the review period, the Senate CRA Committee introduced Senate Joint Resolution No. 34. If adopted by a majority of the full Senate and House, it would have rejected the amended annexation proposal. On the same day the House CRA Committee introduced a resolution identical in substance, House Joint Resolution No. 39 (HJR 39).



<sup>70</sup>One other topic was briefly addressed during the meeting. That involved presentation of the LBC's annual report to the joint committees.

On February 21, 2002, the House CRA Committee met without the Senate CRA Committee to address HJR 39 and related matters. The House CRA Committee met for approximately one hour and thirty minutes. The LBC and residents of the greater Homer territory provided testimony during the meeting. At the end of the meeting, Committee members considered the question to move HJR 39 out of the House CRA Committee. The motion failed by a vote of 1 to 6. The House CRA Committee Chair from Aniak was the only member to vote to move HJR 39 out of the House CRA Committee.

The outcome of the February 21, 2002, House CRA Committee vote effectively ended legislative deliberations on the annexation proposal. Sixteen days later, on March 9, 2002, the 45-day legislative review period concluded.

### ***Section C. Federal Voting Rights Act Review.***

The federal Voting Rights Act, enacted in 1965 and amended in 1970 and 1975, requires federal review of all municipal boundary changes in Alaska. The purpose of the review is to ensure that no qualifications, prerequisites, standards, practices, or procedures will result from municipal boundary changes that would deny or abridge the right to vote on account of race or color or because a person is a member of a language minority group.

On January 16, 2002, the City submitted a fifteen-page Voting Rights Act submission regarding the amended annexation proposal to the U.S. Justice Department. On March 14, 2002, the U.S. Justice Department granted clearance for the annexation.

### ***Section D. Annexation Takes Effect.***

Evidence of the Justice Department review of the annexation was provided to DCED on March 20, 2002. Pursuant to 3 AAC 110.630, the annexation took effect March 20, 2002.

### ***Section E. Appeals to Superior Court.***

On February 8, 2002, CCAA appealed the action of the LBC in Superior Court for the State of Alaska (Case No. 3AN-02-4626 CI). The Appellant's Points on Appeal alleged the following:

1. The LBC failed to recuse a member of the Commission despite an apparent conflict of interest;
2. The LBC failed to require truncation of terms of sitting City Council members thereby violating rights of persons in the annexed territory to vote for their elected representatives;

3. AS 29.35.450(c) required the change of boundaries of KESA and the Kenai Peninsula Borough Road Service Area to be approved by a majority of voters residing in those service areas;
4. The LBC's determination that the territory approved by annexation includes the human and financial resources necessary to provide essential city services on an efficient, cost-effective level is unsupported by substantial evidence;
5. The Petition did not include the required transition plan; the LBC's determination that the requirement was satisfied is unsupported by substantial evidence;
6. The LBC abused its discretion by failing to require the City to enter into an agreement with the Borough and KESA for assumption of powers, duties, rights, and functions and for transfer and integration of assets and liabilities;
7. The LBC's determination that the City could provide essential city services to the territory approved for annexation more efficiently and effectively than the Borough is unsupported by substantial evidence;
8. The LBC's determination that the territory approved by annexation exhibited a reasonable need for city government is unsupported by substantial evidence;
9. The "balanced best interests" test of 3 AAC 110.140 and the "best interests" standard of AS 29.06.040(a) are unconstitutionally vague;
10. The LBC's determination that legislative review annexation serves the balanced best interests of the state, territory approved for annexation, Kachemak City, KPB, and City is unsupported by substantial evidence and is incorrect;
11. The legislative review annexation method violates due process and/or equal protection provisions of the federal and state constitutions;
12. The LBC denied Appellant due process by:
  - (a) treating the Appellant differently than the City in terms of time allowed for filings;
  - (b) approving a "substantially different territory for annexation than the territory requested by the City" without affording reasonable notice and an opportunity to be heard;
  - (c) improperly subjecting the annexed territory to taxation for municipal debt incurred prior to annexation;
  - (d) failing to require the City to produce "internal documents related to the projected costs of extension of municipal services"; and
  - (e) failing to require the City to "prove that the City had read the responsive briefs and comments."

On February 19, 2002, “Alaskan’s Opposed to Annexation,” Vi Jerrell, Doris Cabana, *et al.*, also appealed the Commission’s action (Case No. 3AN-02-4832 CI). The Points on Appeal stated by those appellants mirrored those stated by CCAA and summarized above as points 1 – 8, 10, 12(b), 12(c), and 12(d).

On May 21, 2002, CCAA moved for consolidation of the two appeals under Alaska Rule of Appellate Procedure 602(i). The two appeals were consolidated on June 6, 2002, under Case No. 3AN-02-4626 CI.

The City filed an entry of appearance as an appellee on April 22, 2002.

The brief on appeal by Alaskan’s Opposed to Annexation was filed on December 30, 2002. The brief on appeal by CCAA was filed on December 31, 2002.

On January 29, 2003, Abigail Fuller filed a Brief of Appellee.

On February 17, 2002, the City filed its brief on the matter.

The State of Alaska filed a Motion to Strike Brief of Appellee Abigail Fuller. That motion was granted by the Court on February 27, 2003. Abigail Fuller filed a motion for reconsideration. The Court denied that motion on March 10, 2003.

On April 11, 2003, the Alaska Department of Law filed its Brief of Appellee.

Abigail Fuller sought appellant status through a motion to accept late filed notice of appeal on March 17, 2003. The Superior Court granted her motion on April 14, 2003. Ms. Fuller filed a motion to accept a corrected brief on April 21, 2003, which made changes to her originally filed appellee brief.

On April 22, 2003, the City filed a corrected brief in the appeal.

On October 22, 2003, the City filed a supplemental brief in the matter.

The Court held oral argument on the matter on October 29, 2003.

On December 4, 2003, the Court issued its 23-page decision. As noted earlier, the Court affirmed all aspects of the Commission’s decision except one. The Court concluded that, “the LBC erred when it failed to consider the impact annexation would have on KESA” (*Homer Remand Order*, p. 22). The Court remanded the City’s amended annexation petition to the Commission to discuss the impact of the March 20, 2002, annexation on KESA.

The basis for the Court’s opinion that the LBC erred when it failed to consider the impact annexation would have on KESA is outlined on pages 19 – 23 of the *Homer Remand Order*. The Court noted at 19:

[The appellants (Kachemak Area Coalition, Inc.,<sup>71</sup> *et al.*)] contend that Homer essentially “cherry-picked” KESA. The annexation took a large percentage of KESA’s population but left a majority of its territory – over 175 square miles. Thus, KESA was left in a predicament in which it had a greatly reduced tax-base yet remained almost the same size as before the annexation.

Further, the Court observed at 20:

Appellees in the present case [Commission and the City] admit to essentially dismissing any impact the Homer annexation would have on KESA, yet at the same time they claim the issue was discussed as much as the situation warranted. The stated reason for the inattention is that the LBC and Homer maintain that KESA was formed illegally and thus did not deserve serious consideration. Regardless of the motives of those who petitioned to form KESA, KESA was created and will continue to exist even if Homer annexes a portion of it. This court must assume that the remaining service area is legitimate and will be responsible after annexation for providing services within its new boundaries (citations omitted).

The Court stated further at 21-22:

This Court accepts as true that Homer and the Kenai Peninsula Borough agreed to an amicable transfer of assets. However, given the amount of attention focused on KESA from even before its inception, this Court finds the lack of consideration given to the effect annexation would have on KESA troubling. Mentioning KESA in passing, or in connection with the additional burdens the City planned to take on is not the same as a discussion about the impact annexation would have in view of whether the annexation was in the best interests of the state. Clearly, annexation of the entire service area was not in the state’s best interests, as the LBC did not approve even the entire 25+ square miles for which Homer originally petitioned.

Because it was impossible for the City to include a transition plan for KESA at the time of its petition (since it did not yet exist), a discussion of the effect annexation would have on surrounding services [sic] areas, was warranted to ensure that the annexation was indeed in the best interests of the state. There is no evidence that any such discussion ever occurred. Thus, a remand is appropriate to ensure that the LBC considers this issue (citations omitted).

On December 15, 2003, the Alaska Department of Law asked the Court to reconsider its decision. On December 16, 2003, the City joined the Department of Law in

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<sup>71</sup>The full name of this respondent/appellant is "Kachemak Area Coalition, Inc., d/b/a Citizens Concerned About Annexation" but is referred to herein as "CCAA".

requesting reconsideration by the Court. The Court denied the motion for reconsideration on December 23, 2003.

The action taken by the Superior Court in this proceeding does not constitute final judgment. Therefore, there was no automatic right to appeal. Alaska Rule of Appellate Procedure 402(b)(2) states, "Review is not a matter of right, but will be granted only where the sound policy behind the rule requiring appeals to be taken only from final judgments is outweighed . . ." Neither the Alaska Department of Law nor the City petitioned the Supreme Court for review of the Superior Court remand.<sup>72</sup>

## ***Section F. Proceedings to Date Relating to the Homer Annexation Remand.***

### **Subsection 1. Recusal of One Commissioner and Establishment of Remand Procedures.**

None of the five members of the Commission currently serving on the LBC participated in the original annexation proceedings. When the current members of the Commission were informed of the Superior Court's decision, one member declared potential conflicts of interest. That Commissioner indicated that his recusal from the proceedings seemed warranted under the State Executive Branch Ethics Act and other applicable standards. He requested that the Chair rule on the matter. In March 2004, after consulting with the Alaska Department of Law, the LBC Chair recused the Commissioner from the Homer annexation remand proceeding.

On May 18, 2004, the four members of the Commission who will consider this issue adopted procedures for this remand proceeding. Copies of the procedural order were distributed to potentially interested individuals and groups. The procedural order is also available for review online at:

[http://www.commerce.state.ak.us/dca/lbc/homer\\_annex\\_remind.htm](http://www.commerce.state.ak.us/dca/lbc/homer_annex_remind.htm)  
("Homer Remand Web site").

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<sup>72</sup>See n. 6.


## Subsection 2. Public Notice of Remand.

In accordance with the procedural order adopted by the LBC, DCED published the *Notice of Opportunity to Comment Regarding KESA and Homer Annexation Remand* ("notice of remand") in a display ad format in the *Homer Tribune* on May 26, 2004, and in the *Homer News* on May 27, 2004.

On May 21, 2004, DCED mailed the notice of remand to the City; each of the respondents in the original Homer annexation proceeding, the former members of the LBC who participated in the original Homer annexation proceeding; and the respective legal counsel for: the Commission; City; Alaskan's [sic] Opposed to Annexation, *et al.*; CCAA; and Abigail Fuller.

On May 21, 2004, DCED submitted a *Request for PSA Regarding Opportunity to Comment Regarding KESA and Homer Annexation* to radio stations listed in *Alaska Media Directory – 03* as serving the Kenai Peninsula (i.e., KBBI-AM; KDLL-FM; KGTL-AM; KKIS-FM; KPEN-FM; KSLD-AM; KSRM-AM; KWHQ-FM; KWWV-FM; and KXBA-FM) and requested that it be announced for 14 days following receipt of the request.

1	STATE OF ALASKA
2	LOCAL BOUNDARY COMMISSION
3	Before Commissioners: David E. Johnson, City Clerk and Secretary
4	Robert H. Johnson, Mayor
5	Anthony N. Johnson
6	HOMER REMAND - IN THE MATTER OF THE
7	MARCH 20, 2002 PETITION BY THE CITY OF
8	HOMER FOR ANNEXATION OF APPROXIMATELY
9	20.64 SQUARE MILES
10	ORDER RELATING TO PROCEDURES FOR CONSIDERATION OF THE
11	AMENDED CITY OF HOMER ANNEXATION PETITION UPON REMAND
12	On March 20, 2002, the City of Homer submitted the Local Boundary
13	Commission (LBC) Petition (LBC Petition) for annexation of approximately 20.64 square
14	miles. On December 26, 2001, following proceedings set out in 3 AAC 110.020
15	3 AAC 110.040, the Commission approved the petition to annex the territory from
16	20.64 square miles to 4.58 square miles (hereinafter "annexed territory"). At that
17	meeting, the Commission also approved the annexed petition.
18	On January 17, 2002, the Commission denied six requests for
19	reconsideration of its decision. On January 20, 2002, the Commission presented to the
20	Special Session of the Twenty-Sixth Alaska Legislature, a project, under Article X,
21	§ 1 of the Constitution of the State of Alaska, for annexation to the City of Homer of the
22	4.58 square miles that make up the annexed territory. The legislation, which was
23	and Commission's proposed boundary change on March 20, 2002, by not rejecting the
24	proposal within the time allowed under Article X, § 12, Amendment, was signed on
25	March 20, 2002, pursuant to 3 AAC 110.010, approved by DCED at the direction of
26	David E. Johnson, Secretary, Remand of the Homer Annexation Petition

 <p><b>NOTICE OF OPPORTUNITY TO COMMENT REGARDING KESA AND HOMER ANNEXATION REMAND</b></p> <p><b>STATE OF ALASKA LOCAL BOUNDARY COMMISSION</b></p> <p>Upon remand by the superior court, the Local Boundary Commission will discuss the Kachemak Emergency Service Area (KESA) and effect on KESA of the 4.58 square mile annexation to the City of Homer that occurred March 20, 2002. The court indicated that such discussion is warranted to ensure that annexation was in the best interests of the State.</p> <p>An interested person or entity may file written comments with the Commission concerning this issue. <u>Written comments based on evidence dated or events occurring after January 17, 2002 (the date on which the Commission denied requests for reconsideration of its December 26, 2001, decision), will be rejected.</u> The provisions of 3 AAC 110.050 prohibiting ex parte contact with the Commission apply to this remand proceeding.</p> <p>A printed copy of the original petition materials is available for review at the office of the Homer City Clerk, 491 East Pioneer Avenue, Homer (telephone: 235-3130). Copies of the record in electronic format (Adobe Acrobat pdf on CD) have been provided to each of the respondents in the original proceeding. Multiple CDs of the record have also been provided to the Homer Public Library and the Homer City Clerk for use by the public. CDs are also available upon request from Commission staff.</p> <p>To be considered, <u>written comments must be received in the office below by 4:30 p.m., Thursday, June 24, 2004.</u></p> <p>Local Boundary Commission Staff 550 West Seventh Avenue, Suite 1770 Anchorage, AK 99501-3510</p> <p>Fax: 907-269-4539 Email: LBC@dced.state.ak.us</p> <p>Further information about this matter, including details regarding the procedures to be used by the Commission is posted on the Commission's Web site at <a href="http://www.dced.state.ak.us/dca/lbc/lbc.htm">http://www.dced.state.ak.us/dca/lbc/lbc.htm</a> under "Homer Annexation Remand" which is listed in the "Quick Links" directory. Inquiries may also be directed to Commission staff by telephone at (907) 269-4559.</p>
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On May 24, 2004, DCED posted the notice of remand on the Alaska Online Public Notice System (AS 44.62.175) and arranged for the notice of remand to be posted on the Commission's Web site at <http://www.commerce.state.ak.us/dca/lbc/lbc.htm> under "Homer Annexation Remand" to be listed in the "Quick Links" directory.

Further, DCED arranged for the City to post the notice of remand in three prominent locations (Homer Public Library, Homer Harbormaster's Office, and Homer City Clerk's Office) readily accessible to the public and to ensure that notices posted remain posted through June 24, 2004, the deadline for comment on this remand.

**Subsection 3. Service of the Record on Appeal and Other Materials for Purposes of Remand.**

On May 20-21, 2004, DCED provided the materials listed below to each participating member of the Commission; the former Commission members who participated in the original Homer annexation proceeding; City; Homer City Clerk (15 copies); Homer Public Library (15 copies); each of the respondents; and the respective legal counsel for: the City; Alaskan's [sic] Opposed to Annexation, *et al*; CCAA; and Abigail Fuller.

1. the complete record on appeal to the Superior Court in electronic format (Adobe Acrobat pdf on CD);
2. "Order on Appeal of Local Boundary Commission Decision," *Homer Remand Order*, 3 AN-02-0426 CI (Alaska December 4, 2003), in electronic format (Adobe Acrobat pdf on CD); and
3. a printed copy of the Order (with attachments).

**Subsection 4. Written Comments.**

The procedures adopted by the Commission allowed interested person or entities to submit written comments concerning KESA and the effect on KESA of the annexation of 4.58 square miles to the City based on evidence dated or events occurring on or before January 17, 2002 (the date on which the Commission denied requests for reconsideration of its December 26, 2001, decision).

The Commission's procedural order indicated that written comments based on evidence dated or events occurring after January 17, 2002, would be rejected.

To be considered, the written comments had to be received by DCED no later than 4:30 p.m., June 24, 2004. Timely comments were received from the following 18 individuals or groups:

1. Milli Martin;
2. Gary J. Peterson;
3. Jim Reinhart;
4. Phil and Tammy Clay;
5. Linda Reinhart;
6. Abigail Fuller;
7. Michael Ryan;
8. CCAA;
9. Sharon Bouman;
10. Pete Roberts;
11. Dave and Eileen Becker;
12. Doris Cabana;
13. Alaskans Opposed to Annexation;<sup>73</sup>

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<sup>73</sup>Alaskans Opposed to Annexation submitted two sets of comments. One was submitted by Doris Cabana. The other was submitted by Vi Jerrell, Ph.D.

14. Roberta Highland and Robert Archibald;
15. Kevin Waring;
16. City;
17. KPB; and
18. Vi Jerrell, Ph.D.

DCED promptly posted a copy of all written comments on the Homer Remand Web site.

On June 25, 2004, DCED sent a copy of the written comments to the Homer City Clerk; and legal counsel for: the City; Alaskan's [sic] Opposed to Annexation, *et al.*; CCAA; and Abigail Fuller.

#### **Subsection 5. Reply Comments.**

On July 12, 2004, the City filed comments in reply to the timely written comments noted in the preceding section. Upon receipt, the City's reply comments were posted to the Commission's Web site. On July 19, 2004, a copy of the City's reply comments were sent to the legal counsel for: City; Alaskan's [sic] Opposed to Annexation, *et al.*; CCAA; and Abigail Fuller.

#### **Subsection 6. DCED Remand Preliminary Report.**

DCED prepared this Remand Preliminary Report following its investigation and analysis of the KESA issues and relevant written comments. On August 12, 2004, the Remand Preliminary Report was mailed to each participating member of the Commission; City; Homer City Clerk (15 copies); Homer Public Library (15 copies); each of the respondents in the original proceeding; the respective legal counsel for: the Commission; City; Alaskan's [sic] Opposed to Annexation, *et al.*; CCAA; and Abigail Fuller; the former Commission members who participated in the original Homer annexation proceeding; and any interested person or entity who requested a copy. A copy of the report has also been posted on the Homer Remand Web site.

### ***Section G. Ongoing Procedures Relating to the Homer Annexation Remand.***

DCED's Remand Preliminary Report is currently available for public review and comment. The deadline for the **receipt by LBC staff** of written comments on this Remand Preliminary Report has been set by the Chair of the Commission for **September 2, 2004, at 4:30 p.m.** Comments may be submitted by mail, hand delivery, fax, or e-mail to:

Local Boundary Commission  
550 West Seventh Avenue, Suite 1770  
Anchorage, AK 99501-3510  
Primary Fax: 1-907-269-4539  
Alternate Fax: 1-907-269-4563  
E-mail: [LBC@commerce.state.ak.us](mailto:LBC@commerce.state.ak.us)

Comments on this Remand Preliminary Report received after 4:30 p.m., September 2, 2004 will not be considered by DCED or the LBC.

### ***Section H. Future Procedures Relating to the Homer Annexation Remand.***

#### **Subsection 1. DCED Remand Final Report.**

In its Remand Final Report, DCED will consider all timely submitted written comments addressing the Remand Preliminary Report. By September 23, 2004, DCED will mail its Remand Final Report with recommendations to each participating member of the Commission; City; Homer City Clerk (15 copies); Homer Public Library (15 copies); each of the respondents; the respective legal counsel for: the Commission; City; Alaskan's [sic] Opposed to Annexation, *et al.*; CCAA; and Abigail Fuller; the former Commission members who participated in the original Homer annexation proceeding; and any interested person or entity who requests a copy. DCED will also post a copy of its Final Remand Report on the Homer Remand Web site.

#### **Subsection 2. Public Hearing(s).**

At least three weeks following the mailing of DCED's Remand Final Report, the LBC will convene one or more public hearings at a convenient location within the corporate boundaries of the City. Notice of the date, time, place and subject of the hearing will be

1. mailed, postage prepaid, by DCED to the City, each respondent, the respective legal counsel for: the Commission; City; Alaskan's [sic] Opposed to Annexation, *et al.*; CCAA; and Abigail Fuller; and the former Commission members who participated in the original Homer annexation proceeding;

2. published by DCED at least three times, with the first date of publishing occurring at least 30 days before the date of the hearing, in a display ad format no less than three inches long by two columns wide, in one or more newspapers of general circulation selected by DCED to reach the people in the Homer area;
3. posted by the City in at least three prominent locations readily accessible to the public in the area in which the hearing is to be held for at least 21 days preceding the date of the hearing;
4. posted by DCED on the Alaska Online Public Notice System (AS 44.62.175); and
5. posted by DCED on the Homer Remand Website.

DCED will also submit a request for a public service announcement of the hearing notice to radio stations listed in *Alaska Media Directory – 03* as serving the Kenai Peninsula (i.e., KBBI-AM; KDLL-FM; KGTL-AM; KKIS-FM; KPEN-FM; KSLD-AM; KSRM-AM; KWHQ-FM; KWVV-FM; and KXBA-FM) and request that it be announced for 21 days following receipt of the request.

The Commission may postpone the time or relocate the place of the hearing by conspicuously posting notice of the postponement or relocation at the original time and location of the public hearing, if the hearing is rescheduled no more than 72 hours after the originally scheduled time.

At least 14 days before the hearing, the City and each respondent shall submit to DCED a list of witnesses that the respective party intends to call to provide sworn testimony. The list must include the name and qualifications of each witness, the subjects about which each witness will testify, and the estimated time anticipated for the testimony of each witness. On the same date that the City submits its witness list to DCED, the City shall provide a copy of its witness list to each respondent by hand-delivery or postage-prepaid mail. On the same date that a respondent submits its witness list to DCED, the respondent shall provide a copy of its witness list to the City and to all other respondents by hand-delivery or postage-prepaid mail.

### **Subsection 3. Commission Hearing Procedures.**

The Chair of the Commission shall preside at the hearing and shall regulate the time and the content of statements, testimony, and comments to exclude irrelevant or repetitious statements, testimony, and comments. DCED shall record the hearing and preserve the recording. Two members of the Commission constitute a quorum for purposes of a hearing under this section. As part of the hearing, the Commission may include:

1. a report with recommendations from DCED;
2. an opening statement by the City, not to exceed five minutes;
3. an opening statement by each of the respondents, not to exceed five minutes;
4. sworn testimony of witnesses with expertise in matters relevant to KESA and the effect on KESA of the annexation of 4.58 square miles called by the City;

5. sworn testimony of witnesses with expertise in matters relevant to KESA and the effect on KESA of the annexation of 4.58 square miles called by each respondent;
6. sworn responsive testimony of witnesses with expertise in matters relevant to KESA and the effect on KESA of the annexation of 4.58 square miles called by the City;
7. a period of public comment by interested persons, not to exceed three minutes for each person;
8. a closing statement by the City, not to exceed five minutes;
9. a closing statement by each respondent, not to exceed five minutes; and
10. a reply by the City, not to exceed five minutes.

If more than one respondent participates, the Chair of the Commission, at least 14 days before the hearing, may establish for each respondent time limits on the opening and closing statements that are lower than those time limits set out above.

A member of the Commission may question a person appearing for public comment or as a sworn witness. The Commission may call additional witnesses.

A document may not be filed at the time of the public hearing unless the Commission determines that good cause exists for that evidence not being presented in a timely manner for written response by the City or each of the respondents or for consideration in the reports with recommendations of DCED.

The Commission may amend the order of proceedings and change allotted times for presentations if amendment of the agenda will promote efficiency without detracting from the Commission's ability to make an informed decision.

#### **Subsection 4. Decisional Meeting.**

Within 90 days after the last Commission hearing on the matter, the Commission will convene a decisional meeting to examine the written comments and testimony, make findings and reach conclusions regarding KESA and the effect of the March 20, 2002, annexation upon KESA, and render a decision regarding the matter. The Commission will not receive new evidence, testimony, or briefing during the decisional meeting. However, the Chair of the Commission may ask DCED or a person for a point of information or clarification.

Three members of the Commission constitute a quorum for the conduct of business at a decisional meeting.

The Commission will keep written minutes of the decisional meeting. Each vote taken by the Commission will be entered in the minutes. The approved minutes are a public record.

Within 30 days after the date of its decision, the Commission will file as a public record a written statement explaining all major considerations leading to the decision. A copy of the statement will be mailed to the City, each of the respondents and their legal

counsel, and other interested persons requesting a copy. DCED shall execute and file an affidavit of mailing as a part of the public record of the proceedings.

Unless reconsideration is requested timely or the Commission, on its own motion, orders reconsideration, a decision by the Commission is final on the day that the written statement of decision is mailed, postage prepaid to the City, the respondents, the respective legal counsel for: the Commission; City; Alaskan's [sic] Opposed to Annexation, *et al.*; CCAA; and Abigail Fuller.

### **Subsection 5. Reconsideration.**

Within 18 days after the Commission's written statement of decision is mailed as noted above, a person or entity may file an original and five copies of a request for reconsideration of all or part of that decision. Within 20 days after a written statement of decision is mailed under 3 AAC 110.570(f), the Commission may, on its own motion, order reconsideration of all or part of that decision.

A request for reconsideration from a person or entity must describe in detail the facts and analyses that support the request for reconsideration.

A person or entity filing a request for reconsideration must provide DCED with a copy of the request for reconsideration and supporting materials in an electronic format. DCED may waive the requirement if the person or entity requesting reconsideration lacks a readily accessible means or the capability to provide items in an electronic format.

The person or entity filing a request for reconsideration must also file an affidavit of service stating that the request for reconsideration and affidavit were served on the City by regular mail, postage prepaid, or by hand-delivery. The person or entity filing a request for reconsideration must file an affidavit stating that, to the best of the affiant's knowledge, information, and belief, formed after reasonable inquiry, the request for reconsideration is founded in fact, and is not submitted to harass or to cause unnecessary delay or needless expense in the cost of this remand proceeding and that a copy of the affidavit has been served on the City.

If the person or entity filing the request for reconsideration is a group, the request must identify a representative of the group.

The Commission will grant a request for reconsideration or, on its own motion, order reconsideration of a decision if the Commission determines that:

1. a substantial procedural error occurred in the remand proceeding;
2. the vote was based on fraud or misrepresentation;
3. the Commission failed to address a material issue of fact or a controlling principle of law; or
4. new evidence not available at the time of the hearing relating to a matter of significant public policy has become known.

If the Commission does not act on a request for reconsideration within 20 days after the decision was mailed as described in the preceding section, the request is automatically denied. If the LBC orders reconsideration or grants a request for reconsideration within 20 days after the decision was mailed, the Commission will allow the City 10 days after the date reconsideration is ordered, or the request for reconsideration is granted, to file an original and five copies of a responsive brief describing in detail the facts and analyses that support or oppose the decision being reconsidered. The City must provide DCED with a copy of the responsive brief in an electronic format, unless DCED waives this requirement because the City lacks a readily accessible means or the capability to provide items in an electronic format.

Within 90 days after DCED receives timely filed responsive briefs, the Commission, by means of the decisional meeting procedure set out in 3 AAC 110.570(a)-(f), will issue a decision on reconsideration. A decision on reconsideration by the Commission is final on the day that the written statement of decision is mailed, postage prepaid, to the City.

## CHAPTER 3 - REVIEW AND ANALYSIS OF THE ISSUE ON REMAND

### ***Section A. Prior Decisions of the LBC***

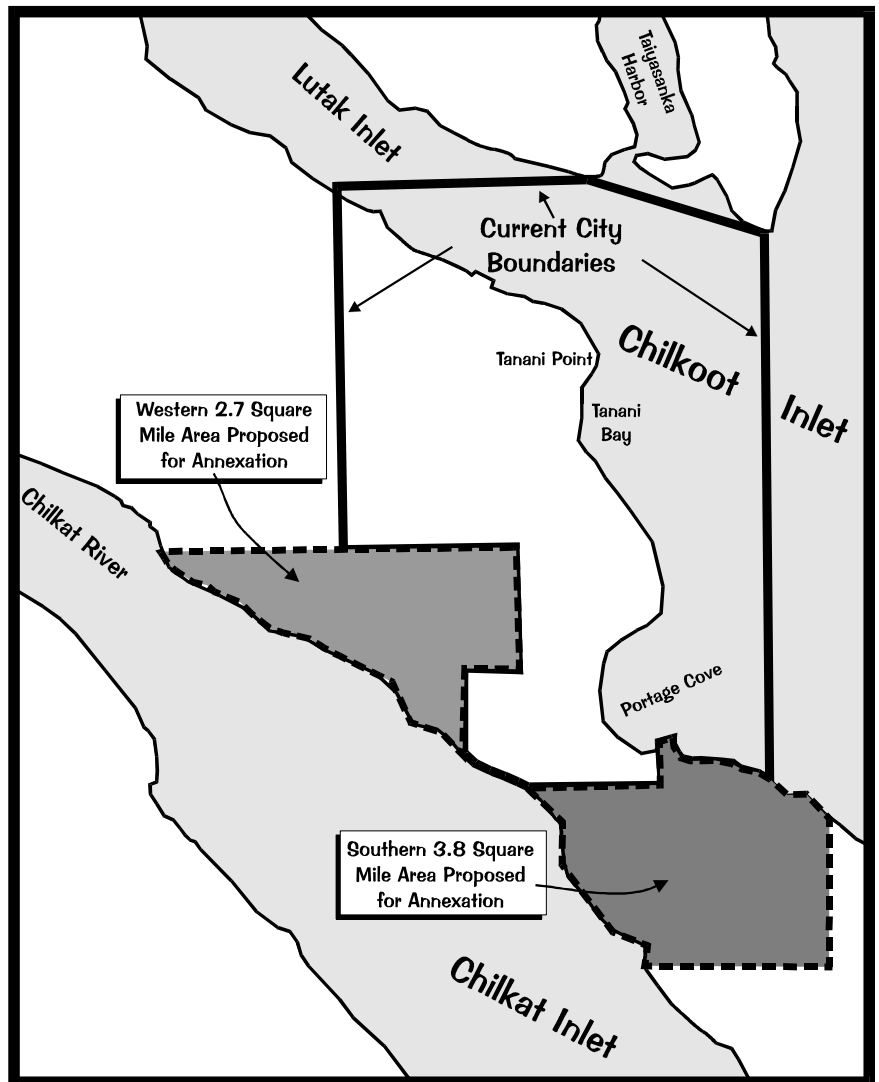
The constitutional and statutory preference for city annexation over the establishment of a new borough service area has been addressed in numerous instances by the LBC. Conflicts over city annexation versus borough service areas have often existed in proceedings before the Commission. This section of the report reviews recent decisions of the Commission relating to city boundary proceedings involving borough service area issues.

#### **Subsection 1. 1997 City of Haines Annexation Proposal.**

On March 12, 1997, the City of Haines petitioned the LBC to annex 6.5 square miles. Responsive briefs opposing annexation were filed by the then third-class Haines Borough<sup>74</sup> and an unincorporated association of local residents known as the Haines Borough Citizens Against Annexation.

All or portions of the 6.5-square mile territory were included in eight different borough service areas. Four of the eight service areas were wholly within the territory proposed for annexation, while the other four extended beyond the 6.5-square mile territory.

As a third-class borough, the Haines Borough was authorized by law to provide only two areawide services (education and taxation) and just one nonareawide service



<sup>74</sup>The third-class Haines Borough and first-class City of Haines consolidated as a home-rule borough on October 17, 2002.

(hazardous materials control). All other services by a third-class borough could only be provided on a service area basis.

In its November 26, 1997, decision, the LBC<sup>75</sup> stressed that the constitutional and statutory limits on creation of borough service areas imposed “significant legal constraints” on the ability of the Haines Borough to serve the territory in question. The Commission stated in that regard:

[B]orough service areas may only be established within the provisions of Article X, § 5 of Alaska’s constitution and AS 29.35.450. Those provisions stipulate that a service area may not be created if services can be provided through annexation to an existing city. The Commission finds that, in contrast to the City of Haines, the Haines Borough has significant legal constraints on its ability to provide services to the area in question (other than education, tax assessment, tax collection, and control of hazardous materials).

*Statement of Decision in the Matter of the March 10, 1997, Petition of the City of Haines for Annexation of Approximately 6.5 Square Miles*, Local Boundary Commission, November 26, 1997, p. 6.

Recognizing the legal confines noted above, the LBC addressed the relative capacity of the City of Haines and the Haines Borough to serve the territory in question. The Commission stated in that respect:

Given the limitations of the Haines Borough to provide services on a service area basis, issues concerning constitutional and statutory aspects of borough service areas are fundamental to the question of whether needed services can be provided most efficiently and effectively by the City of Haines or the Haines Borough.

The intent of the constitutional convention delegates regarding the constitutional provisions relating to service areas is addressed in *Borough Government in Alaska* (at 42), a leading treatise on Alaska’s unique form of regional government:

The stated purpose of preventing duplication of tax levying jurisdictions and providing for a minimum of local government units was directly responsible for the constitutional provision that “A new service area shall not be established if . . . the new service can be provided by an existing service area, by incorporation as a city, or by annexation to a city.” The committee’s objective was to avoid having “a lot of separate little districts set up . . . handling only

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<sup>75</sup>The Commission, as it was constituted then, included three of the members that approved annexation of 4.58 square miles to the City of Homer (Kevin Waring, Allan Tesche, and Kathleen Wasserman).

one problem . . .”; instead, services were to be provided wherever possible by other jurisdictions capable of doing so. Moreover, an amendment to eliminate the preference given to city incorporation or annexation over establishment of new service areas was defeated by the convention. (Emphasis added)

In 1983, the Commission determined that the City of Haines was capable of serving nearly the same territory presently proposed for annexation. Notwithstanding, the Haines Borough continued to operate a fire service area immediately adjoining the City of Haines that had been established in 1977. Further, the Haines Borough has since added *seven new service areas* in the territory proposed for annexation. Four of the seven new service areas are located wholly within the territory proposed for annexation. The other three new service areas encompass all of the territory proposed for annexation and more.

The Haines Borough indicates that it is prepared to create still more service areas to provide needed services in the territory proposed for

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**“The position that establishment of new service areas is the constitutionally preferred alternative to city annexation or on par with cities is completely wrong, it’s nonsense.”** Victor Fischer

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annexation. For example, the Borough states in its responsive brief that, *“If the residents of the area to be annexed come to the decision that they need to exercise planning,*

*platting, and zoning powers, they are already able to do so through the current service area system used by the Borough of Haines.”*

Victor Fischer, preeminent expert on borough government including related constitutional principles, commented on the current annexation proposal of the City of Haines. In the context of the issue of service areas, Mr. Fischer indicated that,

In the Haines case, I would go further than the City’s argument that creation of service areas is “inconsistent” with Section 5 of the constitution – I believe it violates both the intent and specific language of this section. (emphasis original)

The position that establishment of new service areas is the constitutionally preferred alternative to city annexation or on par with cities is completely wrong, it’s nonsense. There is no basis whatsoever to support that view. All provisions of Article X make it totally obvious that there are two preferred types of local government units under Alaska’s constitution: cities and boroughs. Service areas are subsidiary units of boroughs. Section 5 unequivocally establishes that

annexation is a preferred alternative to creation of a new service area.

The Commission finds that the area proposed for annexation has developed as the antithesis of the model envisioned by Alaska's constitutional convention delegates more than 40 years ago. What the delegates wanted to avoid is precisely what now exists outside the corporate boundaries of the City of Haines — “a lot of separate little districts set up . . . handling only one problem . . .” Given the Borough's assurance that it is prepared to create yet more service areas in the territory proposed for annexation, the problem is only likely to worsen without annexation.

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**“What the delegates wanted to avoid is precisely what now exists outside the corporate boundaries of the City of Haines — ‘a lot of separate little districts set up . . . handling only one problem . . .’”** Local Boundary Commission

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*Ibid.*, pp. 6 – 7, footnotes omitted.

The LBC reached the identical conclusion in the Homer proceeding with respect to the relative ability of the City and the KPB to serve the territory. The LBC stated the following conclusion on pages 28 – 29 of its Homer decision:

Because of the significant restrictions on its ability to create new service areas, the Kenai Peninsula Borough ranks last among the three municipalities in terms of its legal capacity to extend city-type services to the territory proposed for annexation.

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**The LBC reached the identical conclusion in the Homer proceeding. . .**

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### **Subsection 2. 1999 City of Ketchikan Annexation Proposal.**

On February 5, 1999 – 14 months after the Commission granted the petition for annexation of 6.5 square miles to the City of Haines – the LBC faced another boundary proposal involving substantive issues relating to city annexation versus borough service areas. The City of Ketchikan petitioned to annex a 0.48 square mile portion of the relatively small (1.2 square mile) Shoreline Service Area (“Shoreline”). Having been created by the Ketchikan Gateway Borough Assembly in 1968 to provide fire protection, Shoreline had existed for more than three decades at the time the annexation petition was filed.<sup>76</sup>

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<sup>76</sup>It is noteworthy that voters in the Ketchikan Gateway Borough approved an initiative in October 2003 providing for a petition to the LBC for consolidation of the City of Ketchikan and the Ketchikan Gateway Borough.

Shoreline filed a timely responsive brief opposing annexation.<sup>77</sup> Shoreline and others were critical of the petition, in part, because it encompassed only a portion of the area within Shoreline's defined boundaries. In response, the City of Ketchikan formally expanded its proposal on May 11, 1999, encompassing the entire 1.2-square mile service area.

On November 15, 1999 – 19 days prior to the Commission's scheduled December 4 hearing on the proposal, the Ketchikan Gateway Borough Assembly adopted Ordinance 1123 expanding the Borough's powers within Shoreline, subject to approval of voters in the service area. The expanded powers included construction, maintenance, and operation of roads; "general property security services"; and "hospital and other public works services." The Assembly also proposed a 2-1/2 percent "fire, roads and security sales tax" and a 1 percent "hospital and other public works sales tax" in Shoreline.

On the same day as the hearing, following Commission deliberations, the LBC granted the petition for annexation.<sup>78</sup> In its written decisional statement adopted December 16, 1999, the Commission stressed that even though the Assembly proposed to expand the services to be provided through Shoreline, there was an even broader need for services and, therefore, the existing City of Ketchikan was the preferred service provider. The Commission noted:

[T]he Commission has already found that a reasonable need exists for road maintenance, police service, hospital, and a multitude of other services offered by the City. The Commission does not ascribe any significance to the adoption of Ordinance No. 1123 with respect to the need for city government in the territory proposed for annexation.

*Statement of Decision in the Matter of the 1999 Amended Petition of the City of Ketchikan for Annexation of Approximately 1.2 Square Miles*, Local Boundary Commission, December 16, 1999, p. 5.

The Commission determined that the City of Ketchikan was better able to serve the needs of the 1.2-square miles compared to the Ketchikan Gateway Borough (including through Shoreline).

[T]he Commission finds that the City is able to provide . . . thirteen services more efficiently and more effectively than another existing city government or organized borough. The Commission finds further that those thirteen services are "essential city services" as defined in 3 AAC 110.990(8).

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<sup>77</sup>Recognizing that service areas are only defined geographic areas in which boroughs provide different levels of service, the LBC later adopted 3 AAC 110.480(a) limiting the right to file a responsive brief to individuals and entities that have the capacity to sue and be sued. Service areas lack such capacity.

<sup>78</sup>Three of the members of the Commission that acted on the Ketchikan annexation proposal also approved annexation of 4.58 square miles to the City of Homer (Kevin Waring, Allan Tesche, and Kathleen Wasserman).

According to the staff reports on this matter, the Alaska Department of Environmental Conservation favors, as a matter of public policy, the extension of water and sewer services to the territory by the City as compared to the establishment of an independent water and/or sewer utility operated by Shoreline. That policy recognizes that the expansion of existing utilities generally promotes greater economies of scale and greater rates of success in serving public needs. The City has the infrastructure to extend water and sewer utility service to the territory. The City is currently preparing an engineering plan to extend its water utility system to a portion of the territory.<sup>[79]</sup> The Commission finds from the evidence that the City is able to provide water and sewer utility services more efficiently and more effectively than another existing city government or organized borough. The Commission finds further that water and sewer utility services are essential city services.

. . . [T]he City is able to provide street maintenance to the territory more efficiently and more effectively than another existing city government or organized borough. The Commission finds further that street maintenance services are essential city services.

Although the State Fire Marshal did not take a position concerning the annexation proposal, he agreed with the City that it would be inefficient to maintain two fire departments within two miles of one another in Ketchikan, particularly if each met the standards which the City asserts are necessary to provide adequate fire protection in this case . . .

. . . [The] City is able to provide police service to the territory more efficiently and more effectively than another existing city government or organized borough. The Commission finds further that police service is an essential city service.

Here again, the Commission does not give any significance to the adoption of Borough Ordinance No. 1123 with respect to the City's ability to provide services more efficiently or effectively than another existing local government.

*Ibid.*, pp. 5 – 7.

In terms of the best interests of the State, the Commission concluded as follows regarding the proposed annexation of Shoreline:

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<sup>79</sup>The Commission recognizes that the extension of City water and sewer utilities into the territory will require substantial capital funding through, perhaps, some combination of State grants, local improvement district assessments, and other sources.

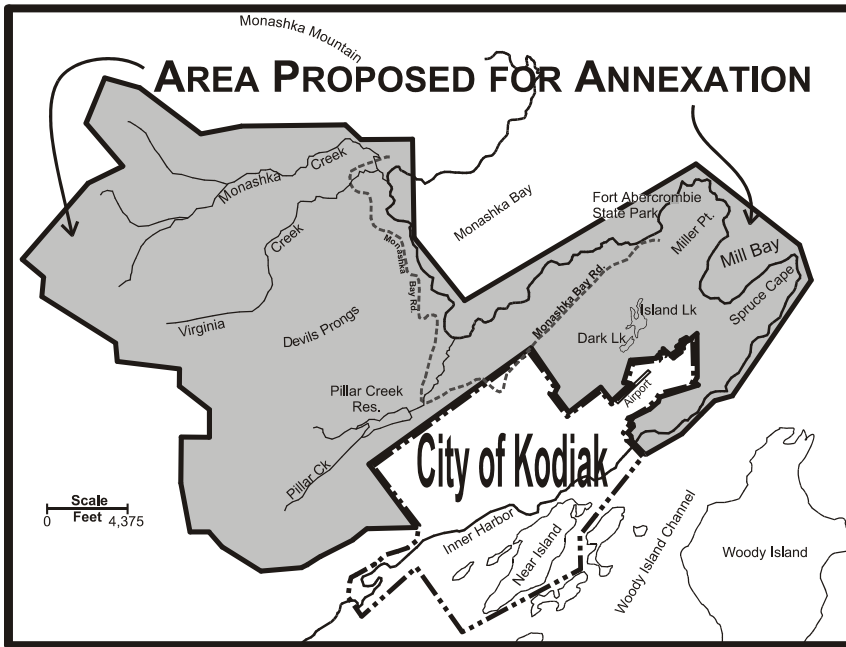
Ordinance No. 1123 appears to be an attempt on the part of the Borough, in part, to offer an alternative to annexation as a remedy of inequities through the assumption of additional responsibilities by the Borough on a service area basis within the territory proposed for annexation. As noted previously, the additional powers in question consist of construction, maintenance, and operation of roads; general property security services, hospital, and other public works services. The assumption of hospital powers on a service area basis (presumably with a payment to the City for the City-owned Ketchikan General Hospital) would remedy some of the inequities, but certainly not all. More importantly, even if the Borough's plan addressed all of the inequities, it is flawed for fundamental reasons. Article X, Section 5 of Alaska's constitution clearly disfavors service areas adjoining city boundaries where those service areas mimic the powers of the adjoining city and exist as a barrier to the legitimate expansion of the city government. The Commission finds from these circumstances that no practical or equitable alternative to annexation is available to offset the cost of providing the benefits enjoyed by the territory.

In contrast to the Borough's proposal, annexation of the territory to the City will integrate the Shoreline Service Area into the City so that Shoreline will no longer exist as a unit of government. This approach is favored by Article X, Section 1 of Alaska's constitution which promotes "a minimum of local government units." The Alaska Supreme Court has interpreted that provision to be a "constitutional policy of minimizing the *number* of local government units." (emphasis added). City of Douglas v. City and Borough of Juneau, 484 P.2d 1040, 1044 (Alaska 1971). The Commission believes that the integration of Shoreline into the City will promote greater equity and will allow the City to deliver services more efficiently and effectively. Such will benefit the City, Borough, citizens of Shoreline, and property owners in the territory.

Annexation will also shift responsibility for certain local services in the territory from the State to local government. These consist of police service and maintenance of certain roads. Annexation may also foster the extension of water and sewer utilities to the territory. The Commission finds that, as a matter of public policy, where communities have the resources to assume responsibility for local services, the State should transfer those responsibilities to the local government.

*Ibid.*, pp. 11 – 12.

### **Subsection 3. 1999 City of Kodiak Annexation Proposal.**



One month after the Shoreline annexation petition was submitted to the Commission, the City of Kodiak petitioned the LBC for annexation of 19.5 square miles. The territory proposed for annexation encompassed six service areas of the Kodiak Island Borough.

The Commission rendered its decision in the Kodiak annexation proceeding in September 1999.<sup>80</sup> In so doing, the LBC stressed that elimination of the service areas through

annexation would achieve constitutional objectives and serve the best interests of the State. Specifically, the LBC stated:

Article X, Section 1 of Alaska's constitution promotes "a minimum of local government units." The Alaska Supreme Court interpreted that provision to be a "constitutional policy of minimizing the number of local government units." (emphasis added). City of Douglas v. City and Borough of Juneau, 484 P.2d 1040, 1044 (Alaska 1971).

The proposed annexation will serve that provision of Article X, Section 1, as well as Article X, Section 5, by eliminating six borough service areas. The Alaska Supreme Court has expressly stated that service areas are local government units in the context of Article X, Section 1. Specifically, the court held that:

It is reasonable to interpret AS 29.35.450(b) and article X, section 5 as preferring incorporation of a city over the creation of new service areas. This interpretation is supported by legislative history and is not inconsistent with article X,

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<sup>80</sup>Three of the LBC members that rendered the Kodiak annexation decision also approved annexation of 4.58 square miles to the City of Homer (Kevin Waring, Allan Tesche, and Kathleen Wasserman).

section 1 of the Alaska Constitution.<sup>[81]</sup> Constructing a barrier to approving an excessive number of government units does not prohibit the creation of them when they are necessary.<sup>[82]</sup> *Whether a service area or a city is established, another government unit is created.* If numerous service areas are set up supplying only one or two services each, there is the potential for an inefficient proliferation of service areas. In contrast, once a city is established, it can provide many services, and other communities can annex to the city in the future.<sup>[83]</sup> Although the framers entertained the idea of unified local governments, they realized that the need for cities still existed.<sup>[84]</sup> (emphasis added) Keane v. Local Boundary Commission, 893 P.2d 1239, 1243 (Alaska 1995).

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<sup>81</sup>Footnote 6 in original. See Morehouse & Fischer, *supra*, at 42 (“the stated purpose of preventing duplication of tax levying jurisdictions and providing for a minimum of local government units was directly responsible for [article X, section 5 of the Alaska Constitution.]”); see also 4 Proceedings of the Alaska Constitutional Convention (PACC) 2714-15 (January 20, 1956) (Delegate Rosswog stated that the main intention of section 5 was “to try not to have a lot of separate little districts set up . . . handling only one problem.”) It is noteworthy that an amendment to eliminate the option of “incorporation as a city” from article X, section 5 was defeated by the convention. 4 PACC 2712-17 (January 20, 1956).

Indeed, the LBC has recognized that the provisions for service areas in article X, section 5 would be “particularly applicable to conditions in Alaska. Thus many areas which have not yet attained a sufficient tax base or population to incorporate as a city will be assisted.” Local Boundary Commission, First Report to the Second Session of the First Alaska State Legislature at I-7 to I-8 (1960).

<sup>82</sup>Footnote 7 in original. Victor Fischer, an authority on Alaska government, “advises that the ‘minimum of local government units’ language . . . was aimed at avoiding special districts such as health, school, and utilities districts having separate jurisdiction or taxing authority. He notes no policy was stated limiting the number of cities and boroughs.” *DCRA Report to the Alaska Local Boundary Commission on the Proposed Yakutat Borough Incorporation and Model Borough Boundaries for the Prince William Sound, Yakutat, Cross Sound/Icy Strait Regions* 50 (December 1991) [hereinafter *Yakutat Report*]. Nonetheless, in *City of Douglas v. City and Borough of Juneau*, 484 P.2d 1040 (Alaska 1971), we noted that article X, section 1 “expresse[s] [a] constitutional policy of minimizing the *number* of local government units.” *Id.* at 1044 (emphasis added). In addition, the DCRA has concluded that “the constitutional language ‘minimum of local government units’ does admonish the LBC to guard against approving the creation of an excessive number of local governments.” *Yakutat Report, supra* at 52. We note that neither view supports the addition of unnecessary government units.

<sup>83</sup>Footnote 8 in original. Delegate Doogan referred to a city as a “combination of service areas within a borough.” 4 PACC 2652 (January 19, 1956).

<sup>84</sup>Footnote 7 in original. In an attempt to simplify local government and prevent the overlapping of governmental functions,” consistent with the purpose of article X, section 1, “the framers of the constitution ... considered establishing a single unit of local government with the abolition of cities altogether.” *City of Homer v. Gangl*, 650 P.2d 396, 400 (Alaska 1982). Although advantageous, the framers considered it a “concept whose time had not yet come.” *Id.* “Section 2 of Article X presents the compromise solution: ‘All local government powers shall be vested in boroughs and cities. The state may delegate taxing powers to organized boroughs and cities only.’ ” *Id.* (quoting Alaska Const. art. X, Sec. 2).

The Commission believes that elimination of the six service areas in the territory will promote greater equity and will allow the City to deliver services more efficiently and effectively. Such will benefit the City of Kodiak, the Kodiak Island Borough, and the citizens and property owners in the annexed area. . .

. . . [T]he Commission concludes that the annexation proposal serves the balanced best interests of the State, the affected local governments, and the territory proposed for annexation.

*Statement of Decision in the Matter of the March 19, 1999, Petition of the City of Kodiak for Annexation of Approximately 19.5 Square Miles*, Local Boundary Commission, September 3, 1999, pp. 18 - 19.

### ***Section B. Creation of KESA.*<sup>85</sup>**

It appears that the first discussions leading to the creation of KESA took place on March 3, 2000. (See, e.g., Comments of CCAA, Ex. H, June 22, 2004.) Shortly thereafter, a petition to create KESA was circulated in the Borough, with the first signature on the petition dated April 12, 2000. The petition was filed on April 25, 2000, with the Borough Clerk, who certified it on May 1, 2000.

The ordinance<sup>86</sup> to establish KESA was introduced to the Borough Assembly on July 18, 2000; and hearings on that ordinance were held on August 1, and 15, 2000. The Borough Assembly approved establishing KESA, including establishing a board of directors therefor, on August 15, 2000. An election on the creation of KESA was held October 3, 2000, at which it was approved by a vote of 614 to 157. The results of that election were certified by the Borough Clerk on October 10, 2000.

On November 21, 2000, the Borough Assembly confirmed an initial board for KESA, which met for the first time on November 30, 2000, and elected officers. At that meeting KESA Board Director Scott Cunningham requested public input about the services residents desired and how they thought they could be best provided. Abigail Fuller, respondent and appellant in the original annexation proceeding and commentor in this remand proceeding asserted that it made "sense to contract with the City of Homer." (KESA Board Minutes, November 30, 2000, p. 1.) (Again, Alaska's Constitution and Statutes plainly prohibit creation of a new service area if the needed service can be provided by annexation to a city.)

There appears to be no question that KESA was established in response to the proposed annexation of territory to the City. The *Kenai Peninsula Clarion* reported on

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<sup>85</sup>KESA's original name was Greater Kachemak Volunteer Fire and Emergency Medical Service Area. Its change of name was approved by the Borough Assembly. For consistency throughout this report, DCED use KESA's current name.

<sup>86</sup>KPB Ordinance 2000-29.

the issue as follows: "Proposition 2: fire service area proposed near Homer. . . . The move to create a service area grew out of Homer's ongoing attempt to annex more than 25 square miles of surrounding territory. *Kenai Peninsula Clarion Online*, September 28, 2000, p. 1. In CCAA's comments of June 22, 2004, it states: "The annexation proposal provided a catalyst to get the voters themselves to initiate the necessary service area." (CCAA Comments, p. 3.)

Among the KESA Board's initial actions was consideration of a proposed contract with the City to provide service to KESA. KESA's initial budget proposal of \$374,372 was presented to the Borough in April 2001. The Borough approved \$50,000 of that budget request on June 5, 2001. According to KESA board minutes, the Borough Assembly "approved the \$50,000 for KESA until we address many concerns ranging from our transition plan, effect of potential annexation, legal responsibilities, and contract negotiations with Homer. [R]esolving the contract issue is critical to our planning and budget process." (KESA Board Minutes, June 14, 2001, pp. 1-2 (emphasis added).)

The initial contract for such service was approved July 9, 2001, by the City, Borough, and KESA. The second contract between the City and the Borough for service to KESA was approved January 7, 2002. Among the terms of those contracts is the following historical acknowledgment of the City's provision of service to the KESA area:

[T]he City of Homer, through the Homer Volunteer Fire Department ("HVFD"), has provided all fire and emergency medical services to the area included in the KESA for approximately the last ten years, before which the City of Homer was the primary funding source for the department and paid all HVFD's administrative expenses . . . .

Interim Agreement for Provision of Fire and Emergency Medical Services, City and Borough, July 9, 2001, p. 1; and Interim Agreement for Provision of Fire and Emergency Medical Services, City and Borough, January 7, 2002, p. 1.

### ***Section C. LBC Awareness of Concerns Over Impact of Annexation on KESA.***

Just as it is evident that the LBC was well aware of the constitutional and statutory preference for city annexation versus creation of a new service area, it is evident that the LBC was equally aware of concerns regarding the impact that annexation would have on KESA.

DCED had addressed numerous issues relating to KESA in its Annexation Preliminary Report. (See pages 5, 12, 13, 25, 195, 246, 253, 263, 264, 295, 296, 303, 306, 307, 308, 313, 314, 315, 322, 338, 340, 359, and 367.) The matter was also addressed in DCED's Annexation Final Report. (See pages 9, 19, 20, 22, 34, A-8, A-9, A-12, and A-15.) DCED also addressed the matter in its November 7, 2001, memorandum to the State Attorney General. The Attorney General's Office responded in its memorandum of December 12, 2001. Moreover, the Commission heard testimony about KESA at the

annexation hearing on December 14 – 15, 2001. The Commission had carefully considered the written materials and testimony before it rendered its decision.

Based on the law and evidence in the proceeding, the Commission addressed fundamental issues regarding KESA throughout its Homer Decision. Specifically, on pages 11 – 13, the LBC considered the effect that annexation would have on residents of KESA in terms of civil and political rights. The Commission noted that annexed residents of KESA would lose the right to hold office as a member of the KESA board of supervisors. However, the LBC noted that annexed residents would gain substantive political rights. Those consisted of the rights: (1) of initiative and referendum concerning laws of the City of Homer; (2) to vote on election propositions of the City of Homer (e.g., bonds to finance capital facilities); (3) to hold appointed office in the Homer city government (e.g., City of Homer Planning Commission); and (4) to hold elected office in the Homer city government (i.e., Mayor or Council). On page 11 of its Homer Decision, the LBC cited the analysis of these matters found in DCED's Annexation Preliminary Report on pages 204 – 213, 363, and 364 and also in DCED's Annexation Final Report on pages 23 – 26 and 34.

On page 15 of its Homer Decision, the LBC addressed in detail its conclusion that detachment of the 4.58 square miles from KESA that would result from annexation to the City was not subject to the voter requirement for voter ratification under AS 29.35.450(c).<sup>87</sup> The Commission noted that DCED and the Office of the State Attorney General shared its views.<sup>88</sup>

The LBC addressed transition matters involving KESA (and other services) on pages 21 – 22 of its Homer Decision. In doing so, the Commission cited "information provided by the [City] in its Petition and Reply Brief," as well as "statements by representatives of

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<sup>87</sup> AS 29.35.450(c) states as follows:

If voters reside within a service area that provides road, fire protection, or parks and recreation services, abolishment of the service area is subject to approval by the majority of the voters residing in the service area who vote on the question. A service area that provides road, fire protection, or parks and recreation services in which voters reside may not be abolished and replaced by a larger service area unless that proposal is approved, separately, by a majority of the voters who vote on the question residing in the existing service area and by a majority of the voters who vote on the question residing in the area proposed to be included within the new service area but outside of the existing service area. A service area that provides road, fire protection, or parks and recreation services in which voters reside may not be altered or combined with another service area unless that proposal is approved, separately, by a majority of the voters who vote on the question and who reside in each of the service areas or in the area outside of service areas that is affected by the proposal. This subsection does not apply to a proposed change to a service area that provides fire protection services that would result in increasing the number of parcels of land in the service area or successor service area if the increase is no more than six percent and would add no more than 1,000 residents.

<sup>88</sup> The LBC cited DCED's memorandum of November 7, 2001, outlining DCED's analysis of the matter. Reference was also made to the December 12, 2001, legal opinion of the Office of the State Attorney General concurring with DCED's analysis.

the [City] during the December 14 – 15, 2001 public hearing.” Moreover, the Commission specifically noted, “During the public hearing both Colette Thompson, Kenai Peninsula Borough Attorney, and Gordon Tans, City of Homer Attorney, expressed confidence that the two governments will amicably reach agreement as to the specific terms surrounding the transfer of . . . fire protection and emergency medical responsibilities.” Further, the LBC repeatedly cited DCED’s review of the issues on pages 244 – 253 of DCED’s Annexation Preliminary Report.

On pages 28 - 30 of its Homer Decision, the Commission addressed the comparative ability of the KPB and the City to serve the 4.58-square mile territory. The LBC cited staff’s 34-page analysis of the issue set out on pages 280 – 313 of DCED’s Annexation Preliminary Report. On page 28 of its Homer Decision, the Commission stated:

Article X, § 5 of Alaska’s Constitution and AS 29.35.450(b) place particular limitations on the creation of new service areas. Both express a preference for city annexation over the creation of a new service area. . . .

On page 29 of its Homer Decision, the Commission concluded:

The legal ability of the Kenai Peninsula Borough to provide services to the territory proposed for annexation is circumscribed by the provisions of Article X, § 5 of the Constitution of the State of Alaska and AS 29.35.450(b). Accordingly, no overriding significance is ascribed to the establishment of the Kachemak Emergency Service Area with respect to the capability of the Kenai Peninsula Borough to serve the territory proposed for annexation.

On page 30 of its Homer Decision, the Commission stated:

When the Petition for annexation was filed, formal arrangements for fire protection and emergency medical services were lacking in the territory proposed for annexation. The subsequent creation of the Kachemak Emergency Service Area provided such formal arrangements in the area petitioned for annexation, except Millers Landing. In other proceedings, the Local Boundary Commission has largely ignored increases in borough services within an area proposed for city annexation if the changes were made only recently and if they appeared to have been motivated, in part, by an effort to weaken the merits of an annexation proposal.

On page 34 of its Homer Decision, the Commission noted that, “Alternatives [to annexation] such as . . . transferring powers from the [City] to [the Borough] service areas . . . are not viable.” The LBC elaborated on its conclusion that the option of transferring powers to service areas was not viable as follows on page 35 of its Homer Decision:

The alternative of transferring powers from the [City] to the [Borough] for operation in service areas raises the same fundamental legal and policy issues that were addressed previously.

Moreover, the [Borough] would be compelled to levy taxes in the service area to support new services. For example, the Borough recently imposed a 1.75 mill property tax to support the newly created [KESA]. As a result of that levy, the property tax differential between the [City] and the territory proposed for annexation has narrowed considerably.

It is conceivable that service areas could proliferate to the extent that overall property tax rates in those service areas would exceed the rates in the City . . . . For example, in Kodiak, borough service areas have proliferated around the corporate limits of the City of Kodiak. Many residents of the area outside the City of Kodiak now pay higher property taxes for fewer services than their counterparts within the City of Kodiak. Additionally, rates charged for water and sewer utility services in the areas adjoining the City of Kodiak are 25% higher than they are within the City of Kodiak.

On page 36 of the Homer Decision, the Commission addressed the fundamental public policy concern that, absent annexation, the prospect existed for proliferation of service areas or even new city governments. The Commission noted:

If the [City's] boundaries are not adjusted, the demand for establishment of additional local governmental units (cities or borough service areas) to provide services in the territory proposed for annexation will likely grow as the area's population and level of development increases. One new borough service area encompassing most of the territory proposed for annexation was created during the course of this annexation proceeding. Additionally, DCED fielded an inquiry from one of the respondents in this proceeding about the prospects of forming a "City of Diamond Ridge."

It is also noteworthy that the very issues that the Court has compelled the LBC to consider in this remand were raised during the LBC reconsideration proceedings. CCAA had asked the LBC to reconsider its Homer Decision, in part, because CCAA perceived that the LBC "brushed aside" KESA (CCAA, request for reconsideration, January 14, 2002, p. 1.)

CCAA raised the very issue that, ". . . the LBC ignored the financial effect of removing a chunk of property from the KESA area and giving it to the City." (*Ibid.*, p. 2.) On page 4 of its request for reconsideration, CCAA states that the LBC gave "KESA the brush-off, based solely on their own habit of ignoring service areas that are formed to try and avert an annexation." CCAA even went so far as to claim that, "This 'policy' is not found in regulation or statute."

On page 5 of its request for reconsideration, CCAA dismissed the LBC's policy concern about the prospect for proliferation of service areas absent annexation by assuring the

Commission that, with the creation of KESA, no new services areas or city governments would be needed. CCAA also asserted that the LBC misapplied the applicable legal standard. Specifically, CCAA stated:

The LBC shows concern (page 36) over new service areas forming (KESA was needed whether annexation occurs or not) or new cities.” The greater area will need or not need additional service areas or even cities regardless of whether the City boundary gets adjusted as proposed. The LBC does not seem to have looked at the greater picture here, which is what this standard is intended for.

After reviewing CCAA's assertions that the LBC had not properly considered KESA in terms of the annexation proposal, DCED outlined to the Commission all of the references to KESA that are noted above in this section of the report. (DCED memorandum, January 16, 2002, pp. 2 – 3.)

One of the tests used by the LBC to determine whether CCAA's request for reconsideration had merit was whether, “the Commission failed to address a material issue of fact or a controlling principle of law.”<sup>89</sup> By denying CCAA's request for reconsideration, the LBC determined that it did not fail to address a material issue of fact or a controlling principle of law with respect to the KESA-related issues in the prior proceedings.

### ***Section D. Standards for Annexation.***

The standards for annexation to cities are set out in the Commission's regulations at 3 AAC 110.090 - 3 AAC 110.150 and 3 AAC 110.900 – 3 AAC 110.910. Those regulations are included in this Report as Appendix C. The regulations were adopted in accordance with the requirement of the APA and under authority of the Constitution of the State of Alaska, Article X, Sections 5 and 12; AS 29.06.040 - 29.06.060; and AS 44.33.812.<sup>90</sup>

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<sup>89</sup>The Commission adopted 3 AAC 110.580(d) on July 27, 2001 providing that:

The commission will, in its discretion, reconsider a decision if

- (1) there was a substantial procedural error in the original proceeding;
- (2) the original vote was based on fraud or misrepresentation;
- (3) the Commission failed to address a material issue of fact or a controlling principle of law; or
- (4) new evidence not available at the time of the hearing relating to a matter of significant public policy has become known.

<sup>90</sup>Formerly, AS 44.47.567; renumbered in 1999. Formerly, AS 44.19.260; renumbered in 1980.

**Subsection 1. Duty of LBC to Adopt Standards.**

One of the Commission's mandatory duties under AS 44.33.812(a)<sup>91</sup> is the adoption of regulations<sup>92</sup> providing standards and procedures for annexation. See *Nome* and *Port Valdez*. In those cases, the Alaska Supreme Court addressed the requirement that the Commission adopt standards for annexation.

**(a) *Nome/Port Valdez* Cases Regarding Mandatory Annexation Standards.**

One of the issues on appeal in the *Nome* case was the absence of Commission regulations dealing with annexation despite a legislative mandate for such. In view of that defect, the Court overturned the Commission's decision and stated:

We think it clear from the overall structure of [AS 44.33.812]<sup>[93]</sup> that the duties imposed upon the commission in subsection (a) are mandatory. . . . We are of the further opinion that the language employed by the legislature made the exercise of the commission's discretion under [AS 44.33.812(a)] conditioned upon the development of standards and procedures for changing local boundary lines . . . . In short, we hold that before the commission could have conducted any effective meetings, or hearings, and prior to its submitting to the legislature a valid proposal concerning the Nome annexation, it was obligated to . . . develop standards for changing local boundary lines.

. . . .

. . . [U]nder Alaska's Constitution this court has the duty of insuring that administrative action complies with the laws of Alaska. Absent known standards governing the changing of local boundary lines, the legislature's ability to make rational decisions as to whether to approve or disapprove proposed local boundary changes of the commission is seriously handicapped.

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<sup>91</sup>AS 44.33.812(a) provides in pertinent part:

(a) The Local Boundary Commission shall

. . . .

(2) adopt regulations providing standards and procedures for municipal incorporation, annexation, . . . (emphasis added).

<sup>92</sup>As is the case for most executive-branch agencies, the Commission must adopt regulations in compliance with the regulation-adoption provisions (AS 44.62.010 - 44.62.320) of the APA .

<sup>93</sup>See n. 90.

*Nome* at 141-142, 144.

The lack of Commission annexation standards was also at issue in the *Port Valdez* case. The Court stated:

We see three purposes underlying the statutory requirement of annexation standards. First, such standards expose the basic decision-making processes of the commission to public view and thus subject commission action to broad corrective legislation. Second, the standards guide local governments in making annexation decisions and in preparing proposals for the commission. Frustration of these purposes cannot harm the opponent of annexation. Third, annexation standards objectify the criteria of decision-making and delineate the battleground for a public hearing. . .

. . . .

In [*Nome*] we held that the failure of the commission to adopt such standards before public hearings into an annexation are held, and before it submitted proposals to the legislature, made the annexation voidable upon timely attack. We found the failure to promulgate legislatively-mandated standards before the *Nome* hearings to be so unreasonable as to undermine the validity of the annexation.

. . . .

We conclude that the commission's failure to promulgate standards, the only error we find at the administrative level of [the *Port Valdez*] proceedings, renders the annexation voidable.

*Port Valdez* at 1155 - 1156, footnotes omitted.

Ultimately, however, the *Port Valdez* annexation was upheld on other grounds. During the pendency of the *Port Valdez* appeal, the Commission did adopt its initial set of annexation standards in 1973. The Court cited that adoption at n. 15 of its *Port Valdez* decision.<sup>94</sup>

### **(b) Standards Adopted by LBC.**

The Commission's annexation standards have been revised several times since their initial adoption in 1973. As noted above, the Commission's regulations setting out standards and procedures for annexation of territory by cities are appended to this

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<sup>94</sup>That footnote reads:

We note that the required standards were promulgated by the commission after our decision in the *Nome* case . . . .

Report. In brief, the constitutional, statutory, and regulatory standards governing annexation to a city within an organized borough require that:

1. The territory must be compatible in character with the annexing city. [3 AAC 110.100.]
2. The territory proposed for annexation may not overlap the boundaries of an existing organized borough or city unless the petition also addresses and demonstrates satisfaction of detachment standards. [3 AAC 110.130(e).]
3. The area proposed for annexation must, with limited exceptions, be contiguous to the existing boundaries of the city to which annexation is proposed. [3 AAC 110.130(b).]
4. The proposed annexation to the city may not deny any person the enjoyment of any civil or political right, including voting rights, because of race, color, creed, sex, or national origin. [3 AAC 110.910.]
5. The proposed boundaries of the city must not include entire geographical regions or large unpopulated areas, except when boundaries are justified by application of standards in 3 AAC 110.090 – 3 AAC 110.130. [3 AAC 110.130(d).]
6. The population within the proposed post-annexation boundaries must be sufficiently large and stable to support the extension of city government. [3 AAC 110.120.]
7. The proposed post-annexation boundaries must include the resources necessary to provide essential city services on an efficient, cost-effective level. [3 AAC 110.110.]
8. A practical transition plan must be provided for the assumption of appropriate powers, assets, and liabilities on the part of the annexing city. [3 AAC 110.900.]
9. The proposed post-annexation boundaries must include all areas necessary to provide the full development of essential city services on an efficient, cost effective level. [3 AAC 110.130(a).]
10. The post-annexation city boundaries must be limited to the developed areas and areas subject to impending development. [3 AAC 110.130(c).]
11. Territory may not be annexed to a city if essential city services can be provided more efficiently and more effectively by another existing city or by an organized borough. [3 AAC 110.090(b).]
12. The territory must exhibit a reasonable need for city government. [3 AAC 110.090(a).]

13. Legislative review annexations must serve the balanced best interests of the state, the territory to be annexed, and all political subdivisions affected by the annexation. [3 AAC 110.140.]

14. Annexations must serve the best interests of the state. [AS 29.06.040.]

For a legislative-review annexation proposal, such as at issue here, 3 AAC 110.140 provides that at least one of the circumstances outlined therein must exist in the territory proposed for annexation. Those circumstances are:

1. The territory is an enclave surrounded by the city to which annexation is sought;
2. The health, safety, or general welfare of city residents is or will be endangered by conditions existing or potentially developing in the territory, and annexation will enable the city to regulate or control the detrimental effects of those conditions;
3. The extension of city services or facilities into the territory is necessary to enable the city to provide adequate services to city residents, and it is impossible or impractical for the city to extend the facilities or services unless the territory is within the boundaries of the city;
4. Residents or property owners within the territory receive, or may be reasonably expected to receive, directly or indirectly, the benefit of city government without commensurate tax contributions, whether these city benefits are rendered or received inside or outside the territory, and no practical or equitable alternative method is available to offset the cost of providing these benefits;
5. Annexation of the territory will enable the city to plan and control reasonably anticipated growth or development in the territory that otherwise may adversely impact the city;
6. Annexation of the territory will promote local self-government with a minimum number of government units;
7. Annexation of the territory will enhance the extent to which the existing city meets the standards for incorporation of cities, as set out in AS 29.05 and 3 AAC 110.005 - 3 AAC 110.042;
8. The Commission determines that specific policies set out in the Constitution of the State of Alaska or AS 29.04, AS 29.05, or AS 29.06 are best served through annexation of the territory by the legislative-review process.

**(c) Standard Directed by the Court Not Included in Standards  
Adopted by the LBC.**

The Court's remand requirement that the Commission must consider the impact annexation would have on KESA is, in effect, an implied new annexation standard created by the Court. It is not a constitutional or a statutory provision. Nor is it a standard adopted by the Commission under AS 44.33.812. Moreover, DCED submits that the Court's new implied standard violates the clear intent of Article X, Section 5 of the Alaska Constitution, which provides, in pertinent part:

Service areas to provide special services within an organized borough may be established, altered, or abolished by the assembly, subject to the provisions of law or charter. **A new service area shall not be established if, consistent with the purposes of this article, the new service can be provided by an existing service area, by incorporation as a city, or by annexation to a city . . .** (emphasis added).

That constraint is reiterated in AS 29.35.450(b): "A new service area may not be established if, consistent with the purposes of Alaska Constitution, art. X, the new service can be provided by an existing service area, by annexation to a city, or by incorporation as a city."

With all due respect to the Court, DCED believes that the Court's new imposed standard clearly violates the intent of those laws and attempts to rewrite them.

Even assuming for the sake of argument that the Court's new implied standard is within its authority to mandate and is otherwise appropriate, the Commission would have to adopt it in accordance with the regulation-adoption provisions of the APA.<sup>95</sup> Otherwise, the standard would be in violation of the Alaska Supreme Court's directives in *Nome* and *Port Valdez* and AS 44.33.812(a) that require the Commission to adopt annexation standards by regulation.<sup>96</sup> However, given the fact that the Court's new implied

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<sup>95</sup>*Regulation* is defined in the APA at AS 44.62.640(a)(3) as:

"regulation" means every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of a rule, regulation, order, or standard adopted by a state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure, except one that relates only to the internal management of a state agency; . . . "regulation" includes . . . "interpretations," and the like, that have the effect of rules, orders, regulations, or standards of general application, and this and similar phraseology may not be used to avoid or circumvent this chapter; whether a regulation, regardless of name, is covered by this chapter depends in part on whether it affects the public or is used by the agency in dealing with the public;

<sup>96</sup>Given the definition of *regulation* in the APA, the application of the Court's new standard would also be in violation of the APA. The Alaska Department of Law provides the following opinion in its *Drafting Manual for Administration Regulations*, 15th ed., June 2002, p. 4:

(continued . . .)

standard is constitutionally and statutorily unsound, it would presumably be rejected by the LBC.

**(d) Inappropriate Nature of Court Remand.**

In addition to the constitutional, statutory, and regulation problems discussed above regarding the Court's new implied standard, its creation exceeds the scope of the Court's authority. In *Nome*, the Alaska Supreme Court addressed judicial review of administrative decisions to determine whether applicable rules of law and procedure were followed. It stated:

. . . [The *Murkowski*] test<sup>97</sup> delineates the contours of judicial review employed by us in the case at bar in reaching the conclusion that the [LBC] failed to comply with the mandate of [AS 44.33.812(a)] that it develop standards for the changing of the local boundary lines. **Without doubt there are questions of public policy to be determined in annexation proceedings which are beyond the province of the court. Examples are the desirability of annexation, as expressed in published standards. Judicial techniques are not well adapted to resolving these questions. In that sense, these may be described as political questions," beyond the compass of judicial review.** But other annexation issues, such as whether statutory notice requirements were followed, are readily decided by traditional judicial techniques. *Murkowski* clearly permits this latter type of review.

*Nome* at 143, emphasis added.

The Commission's annexation standards have been lawfully adopted under the APA, under authority of Alaska's Constitution and Statutes, and comply with the directives of the Alaska Supreme Court in *Nome* and *Port Valdez*. Those standards were appropriately applied in the Commission's decision relating to the 4.58 square mile annexation to the City. The Court's *Homer Remand Order* directed the Commission to discuss the impact of annexation on KESA but otherwise affirmed all aspects of the Commission's decision. As discussed above, the remand issue is neither a published standard nor compliant with the law. For the reasons articulated in *Nome*, *supra*, DCED believes the Court's new implied standard is "beyond the compass of judicial review."

Public-policy questions, such as annexation, have been further addressed by both the Alaska Supreme Court and the U. S. Supreme Court. The Alaska Supreme Court has held: "As to the public policy arguments, they are better addressed to the legislature;

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( . . . continued)

Agency action taken in the absence of necessary regulations will be invalid. If a state agency's interpretation of an existing regulation establishes a new general standard, the new general standard must be adopted as a regulation in accordance with the APA.

<sup>97</sup>The *Murkowski* test (*K & L Distributors, Inc. v. Murkowski*, 486 P.2d 351 (Alaska 1971)) permits judicial review of an administrative decision to "ascertain whether the applicable rules of law and procedure were observed." *Nome* at 143.

that body has ample opportunity to consider them . . . in its review of each municipal expansion . . . ."98 Further, "It is not a court's role to decide whether a particular [law] . . . is a wise one; the choice between competing notices of public policy is to be made by elected representatives of the people."99 In a similar vein, the U.S. Supreme Court has stated that, "The responsibilities for assessing the wisdom of . . . policy choices and resolving the struggle between competing views of the public interest [i.e., annexation] are not judicial ones: 'Our Constitution vests such responsibilities in the political branches'."100

For the foregoing reasons and with all due respect to the Court, the DCED believes that the Court's remand decision is inappropriate.

### ***Section E. Standard of Review on Appeal.***

When an administrative decision, such the Commission's Homer annexation decision, involves expertise regarding either complex subject matter or fundamental policy formulation, the court defers to the decision of the administrative agency if it has a reasonable basis. (*Keane* at 1241 - 1242; *Mobil Oil* at 93; *Tesoro Alaska Petroleum Co. v. Kenai Pipe Line Co.*, 746 P.2d 896, 963 (Alaska 1987).

When interpreting a law that does not implicate an agency's special expertise or determination of fundamental policies, the court exercises its independent judgment. (*See Nome; City of Valdez v. State, Dep't of Community & Regional Affairs*, 793 P.2d 532, 533 n. 6 (Alaska 1999)). The court applies its independent judgment when reviewing constitutional issues that present questions of law, giving to them "a reasonable and practical interpretation in accordance with common sense." (*Arco Alaska v. State*, 824 P.2d 708, 710 (Alaska 1992).)

In its remand decision, the Court stated:

Here, the local boundary decisions made by the LBC involve the agency's particular expertise and the formulation of fundamental policy. Therefore, reasonable basis is the appropriate standard of review for several of the issues on appeal. . . . The Court will [use its independent judgment] in considering whether the residents of KESA suffered a denial of their due process rights and whether the LBC properly considered the effect annexation would have on KESA.

*Homer Remand Order*, p. 7.

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<sup>98</sup>*State v. City of Haines* at 1052. With regard to service areas, however, the Legislature, like the Commission, must also comply with Article X, Section 5 of the Alaska Constitution.

<sup>99</sup>*Concerned Citizens of South Kenai Peninsula v. Kenai Peninsula Borough*, 527 P.2d 447, 452.

<sup>100</sup>*Chevron U.S.A.* at 866.

The Court upheld all of the Commission's Homer annexation decision but concluded that the Commission failed to consider the impact annexation would have on KESA. Thus, the Court remanded that issue for consideration. As discussed above, the Court's remand issue creates a new imposed annexation standard, which exceeds the scope of the Court's authority. Moreover, its conclusion is inaccurate. The Commission viewed KESA in light of lawful annexation standards and gave it the weight it deserved.

## ***Section F. Effect of Annexation on KESA.***

### **Subsection 1. Summary of Comments and Reply Comments.**

As noted previously, DCED holds the view that the new standard imposed by the Court in this remand proceeding conflicts with express provisions in Alaska's Constitution and Statutes. Nonetheless, the Court has ordered the Commission to consider the new standard. To facilitate resolution of this matter, this section of the report addresses the effect of annexation on KESA.

As previously noted, a total of 18 timely sets of comments were filed with DCED in response to the Commission's notice and order adopting procedures for this remand proceeding. Those comments are posted on the Homer Remand Web site, available at the Homer City Library, and have been furnished to the Commission.

Some comments do not relate to the issue on remand; i.e., the creation of KESA and the impact of annexation on KESA. Rather, they either express opposition to various aspects of the Commission's Homer Decision that were raised on appeal but upheld by the Court or raise other nonresponsive concerns.<sup>101</sup> As such, they are not germane to the issue on remand and are not summarized herein.

Some comments that address the remand issue do so in very general terms but provide no evidence for the assertions made. In general, however, the following summarizes points that respond to the remand issue.

- ◆ Annexation had a negative effect on KESA because it reduced the size, population, and tax base of the area remaining in KESA, but the cost of providing service to remnant KESA was not correspondingly reduced. Assertions were made that the annexed area removed one-fourth of the tax base from KESA but only 2 percent of the area to be served. Others contend that the annexed area took away 20 percent of KESA's area and one-third of the tax base.
- ◆ Annexation will affect the potential for recruiting volunteers, board members, and community work parties due to the loss in population residing in the reduced area of KESA.

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<sup>101</sup>E.g., property owners were deprived of rights by not being allowed to vote on annexation; alleged Commission bias; procedural issues; etc.

- ◆ Annexation does not affect KESA's responsibility to provide service in the remnant area, but it does remove some of the ability to provide needed services and purchase equipment because of the loss of tax base.
- ◆ Annexation thwarts the self-help efforts of the remnant area by removing as much of the tax base as possible from KESA.
- ◆ Annexation and the loss of revenue from the annexed area affect long-range planning, and growth of the KESA will be slowed, causing harm to those the KESA serves. The loss of revenue decreases KESA's ability to borrow money or have capital funds for grant matches.
- ◆ Annexation is not in the best interests of the State.
- ◆ City and Commission cherry-picked best part of KESA.
- ◆ Annexation results in lost tax revenues of approximately \$114,593 per year to KESA that may be partially offset by a potential reduction in the contract price. However, the City is increasing its fire department budget, so the contract cost to KESA may not drop.
- ◆ If annexation is re-approved, the decision must be submitted to the Legislature for approval or veto.
- ◆ Neither the Borough nor KESA opposed the annexation.
- ◆ KESA's tax base is ample to support a viable service area. While the tax base was reduced after annexation from \$216 million to \$177 million, KESA still retained an adequate tax base to provide services to the remaining service area. In addition, the reduced tax base of \$177 million was higher than three other comparable emergency service areas within the KPB.
- ◆ Even if KESA were affected by annexation, KPB has viable alternatives to negate affect: It could adjust the boundaries of the service area (making them larger to increase tax base, or smaller to reduce the immense size of the area needing service); provide a reduced level of service commensurate with the revenue stream, or increase the millage rate (which had been arbitrarily capped by the borough and voters at 1.75 mills).
- ◆ The State has an interest in wildfire suppression and taking money away from KESA through annexation could lead to inadequate wildfire suppression costing the State millions of dollars. It is in the best interests of the State to have KESA use state and federal funding to provide service to under-served rural areas farther from the City.
- ◆ Annexation is in the best interests of the State.

- ◆ Ruling requiring consideration of effect of annexation on KESA has no constitutional, statutory, or regulatory foundation, runs counter to a previous Alaska Supreme Court decision requiring Commission decisions to be based on regulatory provisions, and will affect future city annexation proposals. These comments by former Commission Chair Kevin Waring are discussed in detail in Chapter 4 of this report.

The City timely filed its reply to the 18 sets of comments. The following is a summary of points made in reply to the issue on remand:

- ◆ Annexation, not a local emergency service area, better serves the overall best interest of the residents, the City, and the State. Initial inclusion within KESA of the 4.58 square miles and 900 residents in the area approved for annexation was an unwise choice from the start. Those residents and properties are part of the Homer community and in clear need of a full range of city services and should never have been included in KESA. The LBC approved annexation for this area because it was already part of the Homer community, it was contiguous and close to Homer, it was the most in need of city services; and it was having the greatest impact on Homer. In short, it best met the standards for annexation. It is precisely because it is more densely populated and developed that it is more suitable for annexation.
- ◆ When annexation is warranted, as in this case, one cannot escape the fact that the tax assessed valuation of any surrounding service areas will be decreased when property is mixed into a city. Because a city is the preferred service provider over proliferating limited service areas, the best interests of the State are served by annexation. When annexation does occur, the adjacent service areas must adjust accordingly. That might require a borough to adjust its service area budget, tax rates, boundaries, levels of service, or otherwise. The Borough and the KESA voters are clearly capable of doing any or all of these things. To have to consider such adjustments is simply an ordinary effect of changing demographics that led to the necessity of annexing some of the Borough territory to Homer. Those ordinary effects certainly do not override the State's best interest or justify denying a well-founded annexation that is otherwise overdue.
- ◆ Commission and City did not cherry-pick KESA. The area was approved for annexation because it met the standards for annexation. Question should be raised as to why the Borough "cherry-picked" Nikiski Fire Service area (with a 2002 tax base of \$1.2. billion) from the rest of the Borough's fire service areas. Other parts of the Borough also need fire services; and if the Borough had chosen to provide nonareawide fire services to all non-city Borough residents, then the residents of KESA could also benefit from the lucrative Nikiski tax base. The Borough has tremendous resources to fund service areas, and the KPB Assembly can exercise control over the boundaries of its service areas to make them work. The Borough has great flexibility to create or modify service areas as needed to make the provision of fire and emergency services available to all on an equitable basis.

- ◆ A rural fire department does need different equipment than a fire department that serves more densely populated and urbanized areas. Annexation of the more populated areas near Homer will enhance the mission of KESA by allowing it to focus more on the rural, harder-to-reach areas through equipment choices and station locations. The State's best interests are served when the City annexes and serves areas near it where it can promptly respond, while KESA attends to under-served areas farther away not as easily served by the City.
- ◆ KPB Mayor's comments express views of his administration and the KESA Board, but not the KPB Assembly. While Mayor asserts that KESA tax base is reduced but costs are not significantly reduced, he does not state that KESA will be unable to continue to provide services. He does not say that KESA cannot make adjustments or find other sources of revenue. KESA has numerous options, including raising the millage rate if the mill rate is insufficient to provide adequate service to the huge service area. Homer's annexation involves a great deal more than fire and emergency services. People in the outlying area do have a great need for fire and emergency services that can be met by KESA, but those who live closest to Homer have a much greater impact on the City and have a need for many more of its services. The interests of the people and of the State are best met when those who have the greatest impact on the City and need the widest variety of services are annexed into the City. Because KESA can never perform the functions of city government, it must yield to annexation in this case. The Borough can exercise options as needed to keep KESA adequately funded and operational.
- ◆ The City does not oppose better services to the distant area; but it does oppose the effort to deny the City jurisdiction over areas that should be in its boundaries so that tax revenues can be diverted from the City to KESA to fund those distant services.
- ◆ The Court's directive to the LBC to consider the effects of annexation on KESA means that the LBC must also consider the converse; i.e., What is the effect on the City of maintaining KESA's original boundaries? That question has essentially been answered by the Commission's decision to allow annexation of the territory because of its impact on the City and how there will continue to be serious impacts if it were not so annexed. The effects of KESA on the City are more varied and considerably more profound than the effects of the City's annexation on KESA. When added to the balanced best interests, the effects of non-annexation on the City show that the annexation is definitely in the best interests of the people, the City, and the State.
- ◆ The City agrees that fighting wildfires is the State's responsibility; if there is a shortfall in revenues or equipment to fight such, then the State should increase its funding for wildfire preparedness. The City should not have to lose tax revenues in order to finance KESA's efforts to fight wildfires that are ultimately a State responsibility. Taking funds from the City and giving them to KESA for the State's benefit not only impedes the City's own financial ability to fight wildfires but also financially weakens the City overall. While helping the Division of

Forestry's fire fighting budget, it results in a weakened and financially strapped city that is not in the best interest of the State.

- ◆ Continuing approval of annexation by the Commission does not require resubmission to the Legislature for consideration. The Court's decision did not invalidate the annexation nor suspend its effect. The annexation has been in effect for two years, and stands as approved unless the Court invalidates it.

### **Subsection 2. Population Density and Overall Population.**

When KESA was created, it encompassed an estimated 218.69 square miles. Shortly after it was established, the 0.26-square mile Millers Landing territory was “annexed” to KESA by action of the KPB. As it was then constituted, the 218.95-square mile KESA was inhabited by an estimated 5,032 residents.<sup>102</sup>

Thus, the population density of KESA before annexation was nearly 23 residents per square mile. After annexation, the population density of KESA dropped to approximately 19.3 persons per square mile. That represented a reduction of 16 percent.

In addition to KESA, five other KPB service areas existed in 2002 to provide fire protection and/or emergency services. Population densities in 2002 in those other five service areas varied from a high of just over 120 residents per square mile to a low of slightly more than 1 person per square mile. The unweighted average population density of those five service areas, based on 2002 population data, was 3.85 residents per square mile. Comparisons for the different districts, along with data for KESA before and after annexation, are shown below.

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<sup>102</sup>The population figures used here and elsewhere in this section of the report are derived from DCED records for State Revenue Sharing and data developed by DCED in the original annexation proceeding. DCED utilized for Revenue Sharing purposes, a 2002 population figure for post-annexation KESA of 4,134. In the annexation proceedings, DCED estimated that the 4.58 square miles approved for annexation had a population of 898. Thus, the population of pre-annexation KESA is estimated to be 5,032. Estimates of the geographic size of various service areas were derived from data obtained from the KPB.

<b>2002 POPULATION DENSITIES OF KPB EMERGENCY AND FIRE SERVICE AREAS</b>			
<b>SERVICE AREA</b>	<b>2002 POPULATION</b>	<b>SIZE (SQUARE MILES)</b>	<b>POPULATION PER SQ. MILE</b>
Bear Creek Fire	1,801	14.95	120.47
Anchor Point Fire and EMS	2,524	127.98	19.72
Central Emergency Services	17,478	886.35	19.72
Central Emergency Medical Service Area	2,309	1,232.47	1.87
Nikiski Fire	5,712	5,479.81	1.04
Unweighted averages	5,965	1,548.31	32.56
KESA (before annexation)	5,032	218.95	22.98
KESA (after annexation)	4,134	214.37	19.28

The population density of KESA after annexation was substantially higher than it was for two of five other service areas. Moreover, KESA's population density was virtually identical to two of the other service areas. Only the compact Bear Creek Fire Service Area had a significantly greater population density compared to that of post-annexation KESA. In DCED's view, population density is a fundamental factor in terms of the efficiency and economies of scale with regard to delivery of services. The data above suggest that KESA remains viable following annexation.

Concerns were also expressed in the course of this remand that the removal of 898 residents from KESA as a result of annexation adversely affects the potential pool of KESA volunteers, board members, and other supporters of KESA's functions. Notwithstanding the loss of residents, post-annexation KESA still had a substantially greater population in 2002 than did the Anchor Point Fire and EMS Service Area, the Central Emergency Medical Service Area, and the Bear Creek Service Area.

### **Subsection 3. Per Capita Tax Base.**

The taxable value of pre-annexation KESA was \$238,585,300 as of January 1, 2002. On a per capita basis, that amounted to approximately \$47,414 per resident.

After annexation, the value of taxable property in KESA dropped to \$177,162,069. The smaller territory was inhabited by 4,134 residents. The per capita property tax base in the post-annexation KESA was approximately \$42,855 per resident.

Annexation reduced the per capita property tax base within KESA by 9.6 percent. In 2002, all of the other five service areas noted in the preceding subsection had per capita tax bases that were greater than that of post-annexation KESA.

However, the post-annexation figure for KESA was only 7 percent less than the \$46,165 per resident figure for the KPB's Bear Creek Fire Service Area. Comparisons to all other service areas in the KPB for fire and emergency medical services in 2002 are provided on the following page.

<b>2002 PER CAPITA TAX BASE OF KPB EMERGENCY AND FIRE SERVICE AREAS</b>			
<b>SERVICE AREA</b>	<b>2002 POPULATION</b>	<b>ASSESSED VALUE (2002)</b>	<b>TAXABLE VALUE PER RESIDENT</b>
Nikiski Fire	5,712	\$1,286,557,871	\$225,237.72
Central Emergency Services	17,478	\$1,043,970,293	\$59,730.54
Central Emergency Medical Service Area	2,309	\$137,770,239	\$59,666.63
Anchor Point Fire and EMS	2,524	\$128,878,208	\$51,061.10
Bear Creek Fire	1,801	\$83,142,052	\$46,164.38
Unweighted averages	5,965	\$536,063,733	\$88,372.07
KESA (before annexation)	5,032	\$238,585,300	\$47,413.61
KESA (after annexation)	4,134	\$177,162,069	\$42,854.88

#### **Subsection 4. Valuation Density.**

Another useful measure of financial capacity is the assessed value per square mile. Before annexation, each of the 218.95 square miles within KESA held, on average, \$1,089,679 in taxable property. After annexation, that figure dropped by 24 percent to \$826,429 per square mile.

Even after annexation, however, the figure for KESA was substantially greater than the comparable measure for three of the five other service areas. The figure for KESA following annexation was also substantially greater compared to the average for all five of those service areas. The comparisons are shown below.

<b>2002 TAX BASE OF KPB EMERGENCY AND FIRE SERVICE AREAS (PER SQUARE MILE)</b>			
<b>SERVICE AREA</b>	<b>ASSESSED VALUE (2002)</b>	<b>SIZE (SQUARE MILES)</b>	<b>TAXABLE VALUE PER SQ. MILE</b>
Central Emergency Services	\$1,043,970,293	886.35	\$1,177,829.73
Anchor Point Fire and EMS	\$128,878,208	127.98	\$1,007,010.85
Nikiski Fire	\$1,286,557,871	5,479.81	\$234,781.62
Central Emergency Medical Service Area	\$137,770,239	1,232.47	\$111,783.56
Bear Creek Fire	\$83,142,052	14.95	\$46,164.38
Unweighted averages	\$536,063,733	1,548.31	\$515,514.03
KESA (before annexation)	\$238,585,300	218.95	\$1,089,679.38
KESA (after annexation)	\$177,162,069	214.37	\$826,428.68

#### **Subsection 5. Conclusion.**

DCED considers population density, per-capita property-tax values, and taxable value per square mile to be fundamental measures of the viability of providing municipal services in these types of cases. While those measures declined for KESA following

annexation to the City, they are certainly not abnormal when compared to other emergency service areas within the KPB at the time. The measures are comparable or, in many cases, favorable to other KPB service areas.

Those measures, coupled with DCED's earlier observation that KESA has continued to operate following a number of budget cycles post-annexation, affirm DCED's belief that KESA has remained viable despite annexation to the City.

## **CHAPTER 4 – CONCLUSIONS AND RECOMMENDATIONS.**

This chapter presents DCED's preliminary conclusions based on the information and analysis set out in Chapters 1 - 3. This chapter concludes with DCED's preliminary recommendations to the LBC for action on the remand.

### ***Section A. The Court Created a New Standard Restricting Annexation to a City If Such Would Have Significant Adverse Impact on a Borough Service Area.***

The Superior Court took the position that it “finds the lack of consideration given to the effect annexation would have on KESA troubling.” (*Kachemak Area Coalition v. City of Homer*, 3 AN-02-0426 CI (Alaska, December 4, 2003), p. 21.) The Court observed that “there is much mention of KESA within both the DCED's Preliminary and Final Reports as well as the whole record. However . . . [t]here is no indication any discussion took place regarding the impact annexation would have on the remainder of KESA.” (*Ibid.*, p. 20.) The Court concluded that, “a discussion of the effect annexation would have on surrounding services [sic] areas, was warranted to ensure that the annexation was indeed in the best interests of the state. There is no evidence that any such discussion ever occurred. Thus a remand is appropriate to ensure that the LBC considers this issue.” (*Ibid.*, p. 22.)

As addressed in detail in Chapter 3, in remanding this issue to the LBC, DCED believes the Court has, in effect, created and imposed a new city annexation standard. Implicit in that new standard is a provision that annexation of a portion of a borough service area to a city can satisfy the previously noted “best interests of the state” requirement only if the annexation has no significant adverse effect on the remnant service area.

### ***Section B. LBC Members Who Approved Annexation of 4.58 Square Miles to City Understood the Constitutional Preference for City Annexation Over Creation of New Service Area.***

Creation or expansion of borough service areas in the face of city annexation proposals is not uncommon. The four Commission members who granted annexation of 4.58 square miles to the City clearly recognized that fact. Those Commission members were equally well aware of the constitutional and statutory preference for city annexation versus creating a new service area.

It is noteworthy that three of the four members that approved annexation of 4.58 square miles to the City had, within the preceding few years, dealt with conflicts involving city annexation versus borough service areas in three prior cases. Details of those cases were provided in Chapter 3 of this report.



In one of those prior cases, annexation critics argued – as is implicit in the new standard imposed by the Court in the Homer remand proceeding – that borough service areas are constitutionally preferred over (or on par with) city annexation. The distinguished Victor Fischer, one of the paramount experts in Alaska’s Constitution and local government, advised the Commission in that particular proceeding as follows:

The position that establishment of new service areas is the constitutionally preferred alternative to city annexation or on par with cities is completely wrong, it’s nonsense. There is no basis whatsoever to support that view. All provisions of Article X make it totally obvious that there are two preferred types of local government units under Alaska’s constitution: cities and boroughs. Service areas are subsidiary units of boroughs. Section 5 unequivocally establishes that annexation is a preferred alternative to creation of a new service area.

Victor Fischer, September 29, 1997, letter, p 1-2.

In its Homer Decision, the LBC concluded as follows (p. 29):

The legal ability of the [KPB] to provide services to the territory proposed for annexation is circumscribed by the provisions of Article X, § 5 of the Constitution of the State of Alaska and AS 29.35.450(b). Accordingly, no overriding significance is ascribed to the establishment of the Kachemak Emergency Service Area with respect to the capability of the Kenai Peninsula Borough to serve the territory proposed for annexation.

The Commission’s decision to allow annexation of 4.58 square miles, notwithstanding concerns expressed by annexation opponents regarding the impact on KESA, involved expertise regarding both a complex subject matter and fundamental policy formulation. By compelling the LBC to address the imposed new standard, the Superior Court has substituted its judgment for that of the Commission. Under long-established principles, deference should have been given to the LBC’s judgment under those circumstances. *See Keane* at 1241; *Lake and Peninsula Borough v. Local Boundary Commission*, 885 P.2d 1059,1062 (Alaska 1994); *Mobil Oil Corp. v. Local Boundary Commission*, 518 P.2d 92, 97-8 (Alaska 1974).

As outlined in detail in Chapters 1 and 3, the imposed new standard created by the Court in its remand order is strikingly inconsistent with the clear preference set out in Alaska’s Constitution and Statutes for city annexation over creation of a new borough service area. Accordingly, it would be improper to apply that standard here or in any future annexation proceeding.

Moreover, even assuming, *arguendo*, that the imposed new standard complied with the Alaska Constitution and Statutes, the Commission is obligated to adopt annexation standards in regulation (AS 44.33.812(a)(2)). Adoption of such a standard by the Commission would be subject to the regulation adoption provisions of the APA. DCED questions whether the due-process requirements of the APA would be violated if the LBC considers the imposed new standard without its adoption as a regulation.

### ***Section C. Views of the Former LBC Member Who Was Chair During the Original Homer Annexation Proceedings.***

As noted in Chapter 2, the LBC, as currently constituted, specifically invited the members of the LBC as it was constituted during the original Homer annexation proceedings, among others, to comment on the issues on remand.

In response to the invitation, Kevin Waring, the former LBC member who was Chair of the Commission throughout the original Homer annexation proceeding, submitted five pages of written comments on the issues.



In DCED's views, the members of the LBC who rendered the Homer Decision are uniquely qualified to express the perspective of the Commission with respect to the issues at hand. For that reason, the comments of the former LBC Chair are, in DCED's view, especially significant with respect to this proceeding. Included in this section of the report are excerpts from the Chair's letter addressing the fundamental issues raised in the Homer remand.

#### **Subsection 1. Annexation of 4.58 Square Miles Was in the Best Interests of the State Regardless of Impacts on KESA.**

On pages 1 – 2 of his responsive comments, former LBC Chair Waring addressed the Court's concern whether the requisite best interests of the state standard was satisfied given impacts on KESA. The former Chair emphasized that the LBC's Homer Decision reflects a solid basis for the Commission's conclusion that the standard was fully met. Specifically, the former Chair states:

Facts in record at the time of the original decision gave the Commission ample reasons, had it thought reasons were needed, to conclude that the annexation was in the best interests of the state regardless of impacts on the remnant KESA.

Among other facts in the original record:

1. The Commission found there was a need for city services in the annexed territory.
2. The Commission found that without the annexation, "both the City and the area approved for annexation could be negatively affected

because, absent planning, development detrimental to both areas will occur.”

3. The Commission found that the City of Homer was best able to provide needed services to the annexed territory.
4. The population in the City of Homer and in the annexed territory greatly exceeded the population of the remnant KESA.
5. The Alaska Constitution elevates general purpose municipal governments over service areas. Boroughs may not establish new service areas where the new service can be provided by an existing service area, by incorporation as a city, or by annexation to a city. Service areas are subordinate to the municipalities that establish them. Service areas lack autonomous authority to levy taxes, charges, or assessments.
6. The City of Homer was a general purpose city municipality with a long history of providing a variety of city services. The KESA was a recently formed limited purpose service area.
7. Since its inception, the KESA contracted with the City of Homer to deliver fire and emergency services to the service area. The KESA did not develop an operational capacity to deliver its services.
8. After annexation as before, the KESA would have several practicable options for delivery of its services.<sup>[103]</sup>
9. The Kenai Peninsula Borough, the municipality responsible for the KESA’s creation and ultimately responsible for its financial condition, concurred in the transition plan, without claim that the annexation would impair the viability of the remnant KESA.

In sum, the original record supports a determination that the benefits of annexation to residents of the City of Homer and the annexed territory outweighed any adverse impacts on the remnant KESA, and that annexation is in “the best interests of the state” as required by AS 29.06.040(a) and 3 AAC 110.135, and as further specified in 3 AAC 110.980. I urge the Commission to affirm its earlier decision to approve the annexation.<sup>[104]</sup>

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<sup>103</sup>Footnote 1 in original. In fact, I believe the KESA has continued its pre-annexation arrangement to contract with the City of Homer for actual delivery of services.

<sup>104</sup>Footnote 2 in original. In my mind, the legality of the KESA was not an issue. At the time the Commission heard the petition, the KESA’s formation was unchallenged and its de facto existence perhaps unchallengeable.

**Subsection 2. The New “Standard” Imposed by the Court Lacks Any Foundation in Law.**

Former LBC Chair Waring shares the views expressed by DCED in detail in this report that the remand ordered by the Superior Court has no basis in Alaska’s Constitution, Statutes, or Administrative Code. The former Commissioner expresses the concern (again, shared by DCED) that the Court’s imposed new standard is not only problematic here, but will create difficulties in future city annexation proceedings unless the current Commission rejects the application of the new standard. On pages 2 – 4 of his comments, former Commissioner Waring states:

[T]he legal premises underlying Judge Rindner’s decision to remand are unsettling in several respects. As best I can tell, the ruling that the Commission **must** explicitly consider annexation impacts on a remnant service area as part of its determination of the “best interests of the state” has no constitutional, statutory, or regulatory foundation. Further, it appears to run counter to a previous Alaska Supreme Court decision requiring the Commission to ground its decisions on regulatory provisions. This matters greatly on both counts.

First, Judge Rindner’s ruling will have implications for many proposed city annexations. City annexation proposals frequently impinge on adjacent service area boundaries. Recent examples include annexation proposals by the cities of Ketchikan, Kodiak, and Haines.<sup>[105]</sup>

Second, Judge Rindner’s ruling that the Commission **must** consider a factor that is not codified in law or regulation is inventive.<sup>[106]</sup> It effectively nullifies the protection that established standards afford to all parties in a proceeding. It exposes the Commission and others to unforeseeable second-guessing. If left unchallenged, it invites mischief in future city annexation proceedings.

Judge Rinder cites Keane v. Local Boundary Commission as a basis for his remand. In Keane, the Alaska Supreme Court properly cited the Commission’s failure to satisfy a specific statutory provision (AS 29.05.021(b)) in remanding the Pilot Point incorporation petition. There is a critical distinction between Keane and the present case. The Keane remand was based on the Commission’s omission to address a specific statutory requirement. No law or regulation requires the

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<sup>105</sup>Footnote 3 in original. The Commission’s decision statements in those cases offer a principled and consistent analysis of issues stemming from city annexation of service areas.

<sup>106</sup>Footnote 4 in original. The Commission’s **discretionary** authority to consider any facts it deems relevant is not here in question. This discretionary authority is implied by AS 29.06.040 which states that the commission **may** (not must) accept a proposed annexation that satisfies applicable statutory and regulatory standards.

Commission to address the impacts of annexation on a service area or remnant service area.

Review of relevant statutes and regulations indicates that this lack is considered and purposeful, and reflects a consistent public policy posture on the relative status of city and borough municipalities and service areas. It is noteworthy that:

1. The Alaska Constitution established a local boundary commission to consider any proposed local government (i.e., city or borough) boundary change, but not service area boundary changes. Service area boundary changes were not deemed a matter of statewide concern comparable to municipal boundary changes and were delegated to municipal governments.
2. AS 29.06.040 establishes a statutory procedure for Commission consideration of municipal boundary changes. The legislature has not adopted comparable statutory procedures governing service area boundary changes.
3. AS 44.33.812(a)(2) requires the Commission to adopt regulatory standards and procedures for **municipal** annexation and detachment. The legislature has not adopted comparable statutory requirement for service area boundary changes.
4. 3 AAC 110 establishes regulatory standards for annexations to cities and boroughs. The Commission has not adopted comparable standards for annexations to service areas.
5. 3 AAC 110 establishes regulatory standards for detachments from cities and boroughs. These standards authorize the Commission to consider impacts on the remnant city (3 AAC 110.260(a)(2)) and the remnant borough (3 AAC 110.260(a)(2)). The Commission has not adopted comparable regulatory standards for detachments from service areas or impacts on remnant service areas.

Clearly, the Alaska Constitution and the Alaska legislature, and the Commission following their lead, have a heightened regard for municipalities compared to their service areas.

**Subsection 3. Imposition of the New Standard by the Court Is Incompatible with Several Previous Alaska Supreme Court Rulings Involving the LBC.**

The former LBC Chair expressed concerns similar to those raised by DCED regarding conflicts between the Court's remand in this matter and prior decisions of the Alaska Supreme Court. On pages 4 – 5 of his comments, the former LBC Chair states:

Judge Rindner's remand decision is problematic in light of two other Alaska Supreme Court decisions.

In U.S. Smelting, Refining and Mining Company v. Local Boundary Commission, the Alaska Supreme Court ruled:

Since under AS 44.19.260(a) the legislature required the commission to develop standards in order to recommend boundary changes, and the commission had not developed regulations prior to the Nome annexation proceedings, we hold that the commission lacked the power to recommend the Nome boundary changes in question. To do otherwise would be to condone the commission's nonobservance of a valid legislative prerequisite to the exercise of the commission's discretion in matters of local boundary changes.

In the present case, the Commission has adopted regulations. The regulations do not require the Commission to consider annexation impacts on remnant service areas. There is no allegation that the Commission has failed to adopt necessary regulations. Judge Rindner's ruling seemingly stands the Alaska Supreme Court's ruling in U.S. Smelting on its head by requiring the commission to address an extra-regulatory standard.

Also puzzling is why Judge Rindner applied "independent judgment" rather than the "reasonable basis test" to the issue of whether the Commission properly considered impacts on the KESA, especially given his cite of and quotes from Mobil Oil Corp. v. Local Boundary Commission. Another telling passage from that decision seems pertinent here:

Appellants attack the scope of the superior court's review of the Commission's action, contending that the court accorded undue deference to the Commission when it declined to undertake independent interpretation of the standards for incorporation. We disagree. Recent cases have established that where administrative action involves formulation of fundamental policy, the appropriate standard on review is whether the agency action has a reasonable basis.

Arguably, Judge Rindner did interpose his independent interpretation of the regulatory standard on the "best interests of the state" to justify the remand, rather than abiding by the "reasonable basis test."

I understand the State chose not to appeal Judge Rindner's decision. Even so, if the Commission affirms its earlier decision, I strongly urge the Commission to take exception now to Judge Rindner's ruling that the Commission **must** consider an extra-statutory or extra-regulatory factor – in this case, the impacts on a remnant service area – in its application of the statutes and regulations.

### ***Subsection D. Neither City Nor LBC “Cherry-Picked” KESA.***

The Commission has jurisdiction over city annexations; it has no jurisdiction over borough service areas. Those who created KESA with boundaries encompassing all of the territory petitioned for annexation bear sole responsibility for any concerns regarding adverse effects of annexation on KESA.

KESA’s creators acted notwithstanding the constitutional and statutory limitations on the creation of new service areas. KESA was formed after the City of Homer petitioned for annexation. Those who created KESA were well aware of the pending annexation proposal. Well before KESA was created, the prospect was widely recognized that all or some portion of the 25.64-square mile portion of the proposed service area would be removed as a result of annexation to the City.

DCED emphasized that, the prospect certainly exists for additional portions of the remnant KESA to be annexed to the City of Homer. In a broader context, all service areas in every organized borough remain subject to boundary changes from city annexations and city incorporations.

The annexation of 4.58 square miles has been derisively characterized in this proceeding as “cherry-picking” KESA because the territory is more densely populated and has a greater per-capita tax base compared to the remainder of KESA. Portrayal of the action as such suggests unfamiliarity with the “limitation-of-community doctrine.”

City governments are community-level municipal governments that are subject to the doctrine. City governments are distinct from borough governments (regional municipal governments) that are not subject to the limitation-of-community doctrine. The Alaska Supreme Court held as follows concerning the distinction:<sup>107</sup>

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<sup>107</sup>In the *Mobil Oil* case (involving incorporation of the North Slope Borough) the Court addressed the limitation of communities doctrine by making a distinction between boroughs and what it termed “municipalities” (e.g., “boroughs are not restricted to the form and function of municipalities”). The Commission has noted repeatedly that the reference to municipalities in *Mobil Oil* was with regard to cities. Most recently, in *School Consolidation: Public Policy Considerations and a Review of Opportunities for Consolidation, Appendix H, Fundamental Nature of Boroughs and Cities in Alaska*, n. 3, that clearly:

In the *Mobil Oil* case (involving incorporation of the North Slope Borough) the Court addressed the limitation of communities doctrine by making a distinction between boroughs and what it termed “municipalities” (e.g., “boroughs are not restricted to the form and function of municipalities”). Clearly, in the view of the Commission, the Court was referring in the *Mobil Oil* case to “cities” (or derivatives thereof such as “city”, or “city government”) when it used the term “municipalities”, (or derivatives thereof such as “municipality”, or “municipal”). It is significant in that regard that when the North Slope Borough incorporation petition was filed, statutory standards and procedures for borough incorporation as well as other laws concerning boroughs were codified in “Alaska Statutes – Title 7 – Boroughs.” In contrast, statutes relating to cities were codified in “Alaska Statutes – Title 29 – Municipal Corporations.” The Court made reference to borough standards and other provisions in AS 07 seventeen times in the *Mobil Oil* case. In 1972, Titles 7 and 29 of the Alaska Statutes were repealed and new laws concerning both cities and boroughs were enacted as “Alaska Statutes – Title 29 – Municipal

(continued . . . )

[Appellants] offer a series of cases striking down municipal annexations and incorporations where the lands taken have been found to receive no benefit. We find this authority unpersuasive when applied to borough incorporation. In most of these cases, the courts inferred from statutes or state constitutions what has been called a ‘limitation of community’ which requires that the area taken into a municipality be urban or semi-urban in character.

There must exist a village, a community of people, a settlement or a town occupying an area small enough that those living therein may be said to have such social contacts as to create a community of public interest and duty. . . .

The limitation has been found implicit in words like ‘city’ or ‘town’ in statutes and constitutions or inferred from a general public policy of encouraging mining or agriculture. In other cases, the limitation has been expressed as a finding that the land taken is not susceptible to urban municipal uses. The result in these cases was determined not by a test of due process but by restrictions in pertinent statutes and constitutions on the reach of municipal annexations and incorporations.

Aside from the standards for incorporation in AS 07.10.030, there are no limitations in Alaska law on the organization of borough governments. Our constitution encourages their creation. Alaska const. art. X, § 1. And boroughs are not restricted to the form and function of municipalities. They are meant to provide local government for regions as well as localities and encompass lands with no present municipal use.

*Mobil Oil*, at 100 (footnotes omitted).

The limitation-of-community doctrine restricts the jurisdictional boundaries of city governments to more urban and developed territories. On average, the boundaries of city governments in Alaska encompass only about 27 square miles.

The limitation-of-community doctrine is a foundation upon which the legal standards for city annexation have been developed. The Local Boundary Commission has found the limitation of communities doctrine to be implicit in AS 29.05.011 regarding city government. Moreover, the Commission found the doctrine to be explicit in its regulations governing city incorporation and annexation. *See: Fundamental Nature of Boroughs and Cities*, p. 3.

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( . . . continued)

Government”. Today, AS 29 refers to both cities and boroughs as municipalities. The distinction in the terms used by the Court in *Mobil Oil* to describe the two types of governments (i.e., “boroughs” and “municipalities”) was purely nominal. However, the distinction made by the Court as to the form of the two types of governments (boroughs and cities) was significant.

For those familiar with the doctrine, it comes as no surprise that application of the annexation standards by the LBC resulted in annexation of only a 4.58-square-mile portion of the KESA's 218.95 square miles. Given the limitation-of-community doctrine, it is not at all remarkable that the 4.58-square mile annexed territory is more densely inhabited and has a higher per capita tax base compared to the 214.37-square mile remnant area of KESA.

The allegation of the City's "cherry picking" KESA and the Court's reliance on that argument in its remand decision is baseless. Aside from the view held by DCED and others that inclusion in KESA of territory that was annexed to the City violated Alaska's Constitution and Statutes and assuming for the sake of argument that "cherry-picking" could be at issue in an annexation or incorporation proceeding, in this case the very history of the City's annexation effort vis-à-vis the creation of KESA militates against such claim. There was no KESA to cherry-pick when the City began its annexation effort. The City's consideration of annexing the territory formally began on December 13, 1999; the Petition was submitted March 20, 2000; accepted for filing by DCED on March 29, 2000; and public notice thereof issued April 3, 2000. All these events predated the establishment of KESA. The first signature on a petition to create KESA was dated April 12, 2000. Following the election regarding that creation, the KPB approved the formation on August 15, 2000. By that time, the City's formal annexation effort was nine months old.

It was the Commission's decision, and the Legislature's approval thereof, that narrowed the size of the territory being annexed. That decision was based on the strictures of Alaska's Constitution and Statutes and application of the Commission's 14 annexation standards, which are law and adopted under mandate from the Alaska Legislature and the Alaska Supreme Court.

Applying the law (i.e., the annexation standards) to the City's Petition, the Commission determined that the State's best interest was served by approving only about one-fifth of the territory requested by the Petitioner. The Legislature tacitly approved that determination. As long as a Commission decision has a reasonable basis of support for its reading of the standards and its evaluation of the evidence, the decision should be affirmed by the Court.<sup>108</sup> However, rather than so affirming, the Court imposed a new standard in this instance.

### ***Subsection E. The Role of the LBC, Legislature, and Court.***

It is difficult for DCED to reconcile the role of the Court with its imposition of a new standard into the consideration of public-policy issues involving annexation. The Alaska Constitution created the Commission "to provide an objective administrative body to make state-level decisions regarding local boundary changes, thus avoiding the chance

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<sup>108</sup> See n. 19.

that a small, self-interested group could stand in the way of boundary changes which were in the public interest."<sup>109</sup> The Alaska Supreme Court also stated: "The policy decision as to . . . annexation is an exercise of lawfully vested administrative discretion which we will review only to determine if administrative, legislative or constitutional mandates were disobeyed or if the action constituted an abuse of discretion."<sup>110</sup> Here, the Court takes the opposite approach. In its new standard, the Court ignores the constitutional and statutory preference for annexation over creation of service areas and rewrites the law to, in effect, supersede that preference.

In *Nome*, the Alaska Supreme Court stated:

Without doubt there are questions of public policy to be determined in annexation proceedings which are beyond the province of the court. Examples are the desirability of annexation, as expressed in published standards. Judicial techniques are not well adapted to resolving these questions. In that sense, these may be described as political questions," [sic] beyond the compass of judicial review.

*Nome* at 143, emphasis added.

In accordance with Article X, Sections 5 and 12 of the Alaska Constitution, AS 29.06.040 - .060, and AS 44.33.812(a), the Commission has provided such published annexation standards (3 AAC 110.090 - 3 AAC 110.150 and 3 AAC 110.900 - 3 AAC 110.910). Based on the conclusions in *Nome*, *supra*, DCED believes the Court's creation of the new implied standard is "beyond the compass" of its authority and proper role.

As was discussed in Chapter 3, the issue of a court exceeding its authority has been addressed in numerous cases. The U.S. Supreme Court has stated that, "The responsibilities for assessing the wisdom of . . . policy choices and resolving the struggle between competing views of the public interest [in this instance, annexation versus service area creation] are not judicial ones: 'Our Constitution vests such responsibilities in the political branches' [i.e., the executive (Commission) and the legislative (Legislature)]."<sup>111</sup>

A 1981 decision by the Alaska Supreme Court dealt precisely with the issue of the court's role in a dispute stemming from city annexation. The case involved the question whether annexation to the City of Haines resulted in an increased municipal tidelands entitlement from the State.<sup>112</sup> The Alaska Department of Natural Resources (DNR) urged the Court to reject Haines' claim for the increased entitlement, in large part, on

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<sup>109</sup>See n. 20.

<sup>110</sup>See n. 21.

<sup>111</sup>See n. 22.

<sup>112</sup>See n. 23.

public policy grounds. DNR was particularly concerned that if Haines prevailed, it would “open the door to municipal speculation in the ownership of tidelands” through annexation (*Haines* at 1050). The City of Haines stressed that annexation was subject to approval by the LBC, which would apply standards (*Haines* at 1051). The Alaska Supreme Court balked at a policy-making role urged by DNR. It noted that annexation decisions are rendered by the LBC and reviewed by the Legislature (*Haines* at 1051, n. 18). The Court stated, “As to the public policy arguments, they are better addressed to the legislature; that body has ample opportunity to consider them . . . in its review of each municipal expansion . . . .”

### ***Section F. Effect of Annexation on KESA.***

Notwithstanding DCED’s strong conviction that the new standard imposed by the Court in this remand proceeding is improper, in compliance with the Court’s directive and to bring this proceeding to a final judgment, DCED addressed, in Chapter 3, the issue raised by the Court.

DCED concludes from the facts in this proceeding that even though the 4.58 square mile territory approved for annexation is more densely populated and has a higher tax base than the 214.37 square-mile remnant service area, annexation has certainly not rendered KESA unfeasible.

As constituted after Millers Landing was added, but before annexation took effect, the 218.95 square miles within KESA’s boundaries were inhabited by an estimated 5,032 residents. The taxable value of that territory was \$238,585,300 as of January 1, 2002, \$1,089,679 per square mile. Annexation reduced the size of KESA to 214.37 square miles, its population to 4,134, and its property tax base to \$177,162,069. In relative terms, the KESA’s geographic size was reduced by 2 percent; its population was cut by 17.8 percent, and its tax base declined by 25.7 percent.

Before annexation, the population density of KESA was nearly 23 residents per square mile. The population density of the post-annexation boundaries of KESA dropped to 19.3 residents per square mile. While KESA’s population density diminished by roughly 16 percent, it remained comparable to two other emergency service areas in the Borough (Anchor Point Fire and EMS, and Central Emergency Services, both at 19.7 residents per square mile). Moreover, KESA’s population density was far greater than two other fire or emergency service areas of the Borough (Central Emergency Medical Service Area at 1.9 persons per square mile, and Nikiski Fire at 1 person per square mile).

Before annexation, KESA’s property tax base was approximately \$47,414 per resident. After annexation, the figure declined to approximately \$42,855 per resident, a drop of 9.6 percent. The post-annexation figure is 7 percent less than the \$46,165 per resident for the KPB’s Bear Creek Fire Service Area as of January 1, 2002.

Before annexation, each of the 218.95 square miles within KESA held, on average, \$1,089,679 in taxable property. After annexation, that figure dropped to \$826,429 per

square mile. However, the figure for KESA remained substantially greater than the comparable measure for three of five other service areas. The figure for KESA following annexation was also substantially greater compared to the average for all five of those service areas.

DCED considers population density, per-capita property-tax figures, and valuation density to be fundamental measures of the viability of providing municipal services in these types of cases. While those measures declined for KESA following annexation to the City, they are certainly not abnormal when compared to other fire protection and emergency service areas within the KPB at the time. The measures are comparable or, in many cases, favorable to other KPB service areas. Obviously, KESA has continued to operate over multiple budget cycles following annexation of the 4.58 square miles to the City. Even the Court seems to recognize that KESA remains viable based on the conclusion at page 20 of the remand order where it states, "KESA was created and will continue to exist even if Homer annexes a portion of it." Thus, DCED concludes that KESA has remained viable following annexation of territory to the City.

### ***Section G. Recommendations to the LBC.***

Based on the foregoing, DCED recommends that the LBC discuss the effect of annexation on KESA and the limitations in Alaska's Constitution and Statutes on the creation of new service areas. DCED urges the Commission to affirm the December 26, 2001, Homer decision granting annexation of 4.58 square miles to the City. Further, DCED recommends that the Commission reject as unconstitutional and otherwise unlawful the new Court-imposed standard that the effect of city annexation on existing or prospective borough service areas must be considered in determining the best interests of the state.

